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## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~736~~ 48

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SYSTEM FEDERATION NO. 91,  
RAILWAY EMPLOYEES' DEPARTMENT,  
AFL-CIO, ET AL., PETITIONERS.

vs.

O. V. WRIGHT, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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PETITION FOR CERTIORARI FILED MARCH 3, 1960  
CERTIORARI GRANTED APRIL 18, 1960

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

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RAILWAY EMPLOYEES' DEPARTMENT,  
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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

No. 13,768

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**SYSTEM FEDERATION No. 91, RAILWAY EMPLOYEES  
DEPARTMENT AFL-CIO, et al., Appellants,**

**—v.—**

**O. V. WRIGHT, et al., Appellees.**

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**Appendix to Appellants' Brief—Filed March 9, 1959**

**[File endorsement omitted]**

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE**

Civil No. 942

O. V. WRIGHT et al., Plaintiffs

—v.—

SYSTEM FEDERATION No. 91, RAILWAY EMPLOYEES  
DEPARTMENT, etc., et al., Defendants

**RELEVANT DOCKET ENTRIES**

1945

7-16 Complaint filed at 4:30 P. M.

7-16 Summonses issued and delivered U. S. Marshal

7-16 29 Summonses issued to Eastern Dist., and mailed  
Mr. Eldred July 19-45

7-21 Summonses returned executed: System Fed. No. 91,  
Railway Employees' Dept. J. T. Powell, Pres. and  
J. Hugh Wheelchel, Secretary, July 20, 1945; Inter-  
national Association Machinists, R. J. May, Gen.  
Chairman thru J. T. Powell, who accepted same  
July 20, 1945; International Brotherhood of Boiler-  
makers, Iron Ship Builders & Helpers of America,  
& P. G. Williams, Gen. Chairman thru J. T. Powell,  
who accepted same July 20, 1945; Sheet Metal  
Workers International Association, J. Hugh Wheel-  
chel, Gen. Chairman, thru J. T. Powell, July 20,  
1945; Brotherhood of Railway Carmen, J. T. Pow-  
ell, Gen. Chm. July 20, 1945

[fol. 2] 7-21 Summons executed on L & N Railroad, J. B.  
Hill, President

7-23 Summons executed on Pan American No. 576 Bro.  
Ry. Carmen, E. C. Sattich, Pres. Sillinger, Secy.

Fox, Treas; Local 1004, Int. Bro. Firemen etc., Turner Dever, Pres.; Jno. W. Detig, Secy.-Treas.; Subordinate Lodge 102—Int. Bro. Boilermakers etc., Int. Bro. Electrical Workers; Local Union 1353—Int. Bro. Elec. Workers; Local 445—Sheetmetal Workers, International Association, et al.; Railroad Lodge 205—Int. Association of Machinists, etc.

7-25 Summons executed on Pan American 576—Bro. Ry. Carmen, W. O. Peteat, Dan'l Deweese, N. A. Wilson, Ray Hall; International Bro. of Firemen, etc. Ray Abner, General Chairman.

7-25 Summons executed on International Bro. Electrical Workers, Walter Allen, Pres. Henry Hogan, V. P.; Subordinate Lodge 102—Int. Boilermakers etc. Brock, R. B. McMasters, D. C. Elder, J. D. Hall, J. M. Hermuth—H. A. Stromier.

7-26 Summons executed on Int. Ass'n. Machinists—C. C. Lee, N. E. McIntyre & Rufus Goodman, F. Berger; Local 445—Sheetmetal Workers etc. Wm. A. Schujahn & Fred Canada

8-8 Motion to dismiss filed by Attys. for L & N Railroad Company

8-8 Motion to dismiss filed by Attys. for Defendants except L & N

8-14 Summons executed on Local 1073 International Asso. of Machinists—M. F. Hodge—W. H. Sharpe and N. C. Jenkins; Loyd F. Johnson, Treas. No. 1073-TR Trosper Com Chr—Lesley Goodin and Rein Teague, Committeemen; Local 362 Int. Bro. of Fire- [fol. 3] men, et al, Edgar Hamblin, Indv. & Pres., Ed Noe, Vice P. and Garfield Carroll, Finc. Secty.; W. C. Stephens, Rec. Secy. Local 362—A. M. Jones, Treas. W. M. Harman, Com Chr—H. L. Disney, Committeeman—George Broughton by serving wife; W. R. Denny, Comm. Local 445—Stone Glass Treas. New Bridge Lodge 284—Thomas Blackwell, Pearl

Miller and Ollie Richardson; Committeemen; New Bridge Lodge 284 et—H. P. Scrivner, Pres. and Individually—Pearl Miller, Vice Pres. and Floyd Neikirk, Secy.

- 8-23 L & N R. R. Cos. Memorandum of Authorities on Motion to Dismiss, filed
- 8-23 Memorandum of Authorities on Motion to Dismiss for all Defts. except L & N R R Co., filed
- 9-7 Memorandum of Authorities relied on by Plaintiff in opposition to Motion to dismiss all defendants except L & N Railroad
- 9-7 Memorandum of Authorities relied on by Plaintiffs in opposition to Motion to dismiss L & N Railroad
- 9-19 Order entered—hearing on motions of various Defendants to dismiss—Arguments—Case under consideration by Court
- 10-2 Order—Defendants Motions to dismiss and to require Plaintiffs to elect, overruled. Copies mailed Attys.
- 10-8 Call—Dec. 5 trial
- 10-16 Agreement extending time for filing Answer to Nov. 15, 1945
- 11-15 Agreed Order allowing Defendants to Nov. 21, 1945 to Answer
- 11-16 Answer of L & N Railroad Company filed
- 11-16 Notice of Taking of Depositions filed
- 11-26 Depositions for L & N Railroad
- [fol. 4] 11-21 Answer of all Defts other than L & N Railroad Co.
- 12-7 Judgment, Decree & Injunction entered. One half costs of this action to be paid by Defendant, Railroad and one-half by Defendant Unions
- 2-1 Petition (Intervening Petition) of John R. Cain filed



- 2-2 Order for issuance of Rule against B. C. Elder, Boiler Shop 3, South Louisville Shops, L & N, entered
- 2-4 Rule issued, returnable Feb. 18th at 10 A. M., for Contempt
- 2-4 Rule executed Feb. 4th on B. C. Elder. Harold Hall, D. M.
- 2-13 Motion of L & N Railroad for leave to file Amended Answer, Counterclaim and Cross-Claim filed
- 2-13 Amended Answer of L & N Railroad, Counterclaim against Plaintiffs and Cross-Claim against its Co-Defendants tendered
- 2-18 Hearing on Contempt Rule—Defendant present, R. E. Mogas, Counsel. John R. Cain present; Counsel, Marshall P. Eldred. Affirmative allegations on behalf of Deft Elder controverted of record. Motion of Elder to dismiss overruled. Exceptions. L & N represented by H. T. Lively and C. S. Landrum. Case taken under advisement by Judge Miller. As to L & N's Amended Counter-Claim etc. filed Feb. 13th it is ordered filed. Parties, other than L & N, given to Feb. 25th to file response and by agreement set for pre-trial Feb. 27 at 10 A. M. insofar as matters in said Amended Answer, etc.
- 2-25 Amended & Supplemental Answer of all Defendants other than L & N R R Co; Counter-claim against Plaintiff; Answer to Cross-Claim of L & N and [fol. 5] Cross-Petition against L & N filed by Robt. S. Hogan, Atty.
- 2-25 Plaintiffs Reply to Answer and Counter-claim of L & N R R Co. filed by Mr. Marshall Eldred, Atty.
- 2-27 Findings of Fact & Conclusions of Law. S. Miller, Jr. Judge
- 2-27 Pre-trial Conference in Judge Shelbourne's office at 10 a. m.
- 2-27 Request of L & N for Admissions under Rule 36 filed



- 2-27 Order entered that Affirmative allegation of Plaintiffs Reply to Answer of L & N and affirmative allegations of Amended Answer of all except L & N etc. be controverted of record
- 3-7 Statement denying specifically certain matters filed for Defts other than L & N
- 3-8 Response to Request for Admissions filed by Plaintiffs.
- 3-11 Pre-trial April 4th 11 A. M.
- 3-16 Order signed by Judge Miller—admonished B. C. Elder, L & N R R & W. D. Nelson for violation of Injunction of Dec. 7, 1945; as supplemented by Agreement of Dec. 12, 1945, and that responses of said Defts to rule issued are insufficient; L & N and Nelson to pay costs
- 3-27 Amended & Supplemental Answer of all defendants other than L & N R R; Amended & Supplemental, Counterclaim against Plaintiffs; Amended & Supplemental Answer to cross-claim of L & N and Amended & Supplemental Cross-Petition against L & N R R Company filed
- 4-4 Ordered motion dismissed insofar as parties here-to seek a declaration of rights\*
- [fol. 6] 4-4 Amendment to Amended Answer, Counterclaim of L & N R R filed
- 4-4 Motion for Summary Judgment filed for Defts except L & N R R
- 4-4 Motion to dismiss filed by Plaintiffs; Dismissed
- 11-15 Motion of C. Pierce Reed, to file Intervening Petition (Rule 24) filed
- 11-15 Intervening Petition of C. Pierce Reed, tendered
- 11-15 Objection filed by L & N Railroad
- 11-15 Objection of Defendants other than L & N and Wigington, filed

- 11-15 Hearing on Motion Dec. 14th
- 12-5 Memo Brief of System Fed. No. 91 et al opposing the petition of C. Pierce Reed
- 12-16 Memo in Support of Defendant L & N Railroad's objection to filing of Intervening petition of C. Pierce Reed, filed—to Judge Shelbourne
- 12-18 Memo Brief of Intervening Petitioner on right to intervene. With record
- 12-19 Hearing on Motion to permit filing of Intervening Petition of Reed—Evidence—Arguments. Permission given to file the intervening petition
- 1947
  - 5-8 Two hour conference in Judge Shelbourne's office
  - 5-12 Supplemental Memorandum in Support of Defendants (Louisville & Nashville)
  - 5-12 Objection to filing of Intervening Petition of C. Pierce Reed, filed by L & N
  - 5-28 Supplemental Memorandum in Support of C. P. Reed's Motion to file Intervening Petition filed by Brown & Eldred for C. P. Reed
  - 12-19 Order signed, re: hearing on C. Pierce Reed's Motion to file his intervening petition. Motion sustained. Intervening Petition ordered filed & Rule to issue returnable Jan. 21, 1948
- [fol. 7] 12-19 Rule issued accordingly
- 12-22 Rule returned executed on L & N R R. C. N. Wiggins, Assnt Gen. Master Mechanic L & N; C. J. Bodmer for Mr. Wiggins. System Federation 91; American Federation of Labor and International Association of Machinists
- 12-30 Rule returned executed Dec. 23 at Corbin, Ky., on M. A. Hodge, T. R. Trosper. U. S. Marshal fee \$5.40
- 1948
  - 1-8 Separate Answer of L & N Railroad to Intervening Petition of Reed

- 1-16 Response of L & N R R to Rule filed
- 1-20 Response of C. W. Wiggins Jr. to Rule filed
- 2-9 Memo for Intervening Petitioner filed by Brown & Eldred, Attys.
- 7-16 Memorandum by Hon. Roy M. Shelbourne finding Defendants guilty of Contempt and fining them \$750.00, to be paid to Reed, Intervenor, and \$200.00 Attys fee to his Counsel
- 8-4 Transcript of Evidence filed
- 3-20 Heard Jan. 21, 1948, on Rule issued on Motion of C. P. Reed to show cause why Defendants should not be adjudged in Contempt of Court, for violating injunction issued on December 7, 1945. Respondent C. N. Wiggins, at conclusion of Interveners evidence, moved to be discharged. Motion was sustained at the time, and ordered now discharged. Wiggins to recover his costs herein
- 8-20 Order adjudging other Respondents (L & N R R Co., System Federation No. 91 Employees' Dept. American Fed. of Labor; International Association of Machinists, Local No. 1073, and T. R. Trosper) guilty of Contempt of this Court for violation of in-[fol. 8] junction of December 7, 1945, and to jointly pay to Intervening Petitioner, C. P. Reed, \$750.00 and to Brown & Eldred, Attorneys, \$200.00, and the costs of this proceeding.
- 8-30 Motion for new trial and for Judgment for defendant L & N R R
- 8-30 Brief of defendant L & N on its Motion for new trial
- 8-30 Motion and grounds for new trial and motion to Stay proceedings to enforce judgment, filed by Counsel for defendants other than L & N
- 9-29 Brief for Intervening Petitioner, C. Pierce Reed, in opposition to Motion for a new trial filed. To M. M. S. with record

- 10-22 Brief for Defts. other than Lou & Nashville R. R. Co. on their motion for a new trial and for Judgment in their favor

1949

- 2-2 Order entered overruling the motion for a new trial and for judgment in favor of respondent L & N Railroad and the motion of defendants, System Federation No. 91 Employees Department American Machinists and T. R. Trosper for new trial and to stay proceedings to enforce judgment entered Aug. 20, 1948

- 2-28 Notice of defendant, L & N of appeal to United States Court of Appeals

- 2-28 Notice of Appeal to United States Court of Appeals filed for Unions

- 2-28 Statement of Points relied on by L & N Railroad

- 2-28 Designation of Portions of Record to be contained in Record on Appeals

- 2-28 Notice of Appeal and Bond for L & N ordered filed. Bond \$1200

[fol. 9] 3-1 Record taken by Mr. Blythe; Westerfield-Bonte

- 3-15 Statement of Points and authorities on which Defendants other than L & N R R intend to rely filed by Robt. E. Hogan, Atty. who sent copy to Mr. Blythe

- 4-4 Supersedeas Bond, Affidavit of Surety H. A. Vititoe and Court Order

1950

- 4-25 Mandates and Opinion United States Court of Appeals in American Federation of Labor, et al vs. C. Pierce Reed and Brown & Eldred, Attys., and in L & N Railroad, appellant vs. C. Pierce Reed and Brown & Eldred, Attys. Appellees, received today and filed—Judgment of District Court affirmed

1957

7-2 Motion to modify Injunction filed by Robt. C. Hogan, Atty. for Defendant—Notice of Hearing 7-16-57 at 9:30 a. m.

7-8 "Response to Notice to File Motion to Modify Injunction," filed by Attys for respondents (Marshal P. Eldred & Brown & Eldred)

7-9 "Motions of the Louisville and Nashville Railroad Company in Response to the Motion of Certain Defendant Unions to Modify the Injunction and Notice" filed by Attys for Defendant (John P. Sandidge and H. C. Breetz)

7-16 Order signed by Judge Shelbourne 7-16-57 that in addition to the Service of Notice on Marshal P. Eldred of the hearing of defendant's Motion to modify the injunction entered in this case on Dec. 7, 1945, Service of Notice should be made on all persons whose rights may be affected by any modification of the judgment etc. previously entered in this case; case continued on said Motion to Sep. 19, [fol. 10] 1957, at 9:30 A. M., CDST or such other date as the Court may hereafter fix; all persons whose rights may be affected thereby to be given notice of the hearing by mail at least 20 days prior to the date set for said hearing—Copies handed Attys of record by Miss Lyon 7-16-57 F. Allen

9-6 Order of Judge Shelbourne that motion to modify the injunction will not be heard on Sept. 19—that action be continued till further order of Court. Copies to Richard Lyman, Lester P. Schoene, Chas. S. Landrum, Marshall Eldred, H. C. Breetz, Robt. Hogan & John Sandidge

11-26 Order of Judge Shelbourne setting Court trial for 1-7-58; Copies to Attys of Record

12-17 4 Subpoenas issued in blank to Atty for Plff.—E. S. Bonnie

- 12-20 "Notice to take Deposition" of Ray Abner on Friday, Dec. 27, 1957, at 10:00 a. m. and J. Hugh Welchel, Friday, Dec. 27, 1957 at 2:00 p. m. at 420 S. 5th St., Louisville, Ky., for purpose of discovery, etc., filed by Atty. for Plffs. (Marshall P. Eldred)
- 12-20 Subpoenas to Take Depositions issued to Ray Abner and J. Hugh Welchel
- 12-21 Response of certain Plaintiffs to Motion to Modify filed by Marshall P. Eldred, Atty. for Walter E. Lee, Marion A. Holman, E. D. Walters, Sherman Napier & V. L. Crutcher
- 12-24 Motion to continue hearing set for 1-7-58 and grant Plaintiffs and classes represented by them additional time filed by Marshall P. Eldred—noticed for Friday Dec. 27 at 2 p. m.
- 12-24 Deposition subpoena as to J. Hugh Welchel returned executed by U. S. Marshal—Deposition sub-[fol. 11] poena as to Ray Abner returned executed by U. S. Marshal
- 12-27 Response of L & N R R Co., to the Motion of Certain Defendants to Modify the Injunction filed by Woodward, Nobson & Fulton (John P. Sandidge)
- 12-27 Certificate that true copy of attached notice was served upon Plffs., filed by Robt. E. Hogan, Counsel for dfds
- 12-27 Certificate that true copy of within Notice was served upon Plffs., employees of L & N etc. filed by Robt. E. Hogan, Counsel for dfds.
- 12-27 Affidavit of Martha Emery filed—before Notary Robt. E. Hogan filed
- 12-27 Affidavit of J. Hugh Welchel filed—before Notary Robt. E. Hogan
- 12-27 Affidavit of Barbara Hieatt, re: addressing envelopes, filed before Notary, Robt. E. Hogan
- 12-27 Order of Court signed by Judge Shelbourne granting additional time to Jan. 20, 1958, in which re-



sponses or objections to System Federation No. 91's motion to modify the injunction might be filed and sets this case for hearing on said motion on Mon. Feb. 3, 1958, at 9:30 a. m. Cyps to Richard Lyman, Lester P. Schoene, Chas. Landrum, Marshal Eldred, H. G. Breetz, Robt. E. Hogan, John Sandidge

1958

- 1-20 Amended Response of Certain Plaintiffs to Motion to Modify filed by Marshall P. Eldred, Atty for plaintiffs—Motion to Intervene filed by Marshal P. Eldred, Atty. for Movants—Hearing 2-3-58 9:30 a. m.—Intervening Response of N. L. Padgett et al., filed by Marshall P. Eldred
- 1-27 Praecipe for Subpoena for W. S. Schell & John [fol. 12] O. Sullivan filed by Edward S. Bonnie—Subpoenas issued and delivered to Bonnie
- 1-31 Following SP's returned executed: All for plff—W. H. Sims, Harold Johnson, N. A. Hargrove, Stanley Ellis, D. A. Lee, John O. Sullivan, J. W. Ritter, Albert W. Washer, W. S. Scholl (duces tecum) E. E. Yates
- 2-3 Depositions taken by Plaintiff 12-27-57 filed by Yoder & Commons 1—Ray Abner 2—J. Hugh Wheelchel
- 2-4 Order signed by Judge Shelbourne dated 2-4-58 this action coming on for trial to the Court, there appeared, Marshall P. Eldred, for certain Plffs; Robt. E. Hogan, Richard R. Lyman and Milton Kraemer, for the dfdt and Jno. P. Sandidge and H. C. Breetz for L & N R. R. Co. Mr. Eldred moved the Court to rule on his motion to intervene; the case was stated for dfdt; evidence for plff. was introduced and concluded; Counsel asked for time to file briefs; simultaneous briefs to be filed within 3 weeks, counsel is allowed 10 days after service of cpy of brief by adversary counsel, for filing reply briefs. When briefs are filed said action to be submitted. Cyps to Attys of record

2-24 Brief of moving Defs. System Federation No 21, etc., et al, in support of Motion to modify Injunction filed by Robt. E. Hogan with certificate of service of Brief

2-24 Motion & Brief for plffs and intervenors in opposition to motion of def to modify filed by Marshall P. Eldred

2-24 Brief on behalf of L & N R. R. Co.—filed by John P. Sandidge

2-26 Objection to Motion of Plaintiffs and Intervenors filed by Robt. E. Hogan

[fol. 13] 2-26 Transcript of Testimony Motion to Modify the Injunction of Dec. 7, 1945, filed by Helen Whedon, Court Reporter with Plaintiffs Exhibits 1-6

3-6 Reply Brief of moving Defendants filed by Richard R. Lyman

3-7 Reply Brief for Plaintiffs filed by Marshall P. Eldred

3-8 Reply Brief on Behalf of L & N R R Co filed by Woodward, Hobson & Fulton

4-18 Memorandum on Behalf of L & N R R Co. (unsigned) received from Judge Shelbourne and filed

4-18 Order signed by Judge Shelbourne dated 4-18-58 sustaining motion of plffs & intervenors and permitting introduction of certain evidence sustained, etc., objection on part dfdts noted; Dfdts directed to serve written notice on certain international unions and local unions (names and addresses set out in order) of the Pending of Motion to Modify injunction heretofore issued in this case on Dec. 7, 1945; that in lieu of serving notice, counsel for moving dfdts may obtain and file herein the written entries of appearance of said International Unions and said local unions joining in said mo. to modify. Copies to Marshal P. Eldred, John P. Sandidge, Lester P. Schoene, Richard R. Lyman, Robert E. Hogan 4-18-58 AL



5-22 "Notice of Appearances" requesting copy of all papers in this action be served on them at their respective offices namely Richard R. Lyman, 741 Nat'l Bank Bldg., Toledo 4, Ohio—Lester P. Schoene, 1625 K. Street, N.W. Washington 6, D. C. Robert E. Hogan, 1906 Ky. Home Life Bldg., Louisville, 2, Ky. for the following named defendants: System Federation No. 91 (see notice for unions listed under) Railroad Lodge No. 205 (Louisville, Ky.) [fol. 14] International Assn. of Machinists—Lodge No. 1072 (Corbin, Ky.) Inter. Assn. of Machinists (Believe should be 1073)—Subordinate Lodge No. 102 (Lou. Ky.) Brotherhood Railway Carmen of Am.—New Bridge Lodge No. 284 (Ravenna, Ky.) Brotherhood RW Carmen of Am.—Local No. 445 (Ravenna, Ky.) Sheet Metal Workers Inter. Assn.—Local No. 1004 (Lou. Ky.) Inter. Brotherhood of Firemen, Oilers, etc.—Local No. 362 (Corbin, Ky.) Int. Bro. of Firemen, Oilers, etc.—Local Union No. 1353 (Lou. Ky.) Brotherhood of Electrical Workers etc.

5-22 "Entry of Appearance" waiving notice of all proceedings herein consenting to the granting of Motion to modify the decree of injunction heretofore entered under date of Dec. 7, 1945; designating Richard R. Lyman, Lester P. Schoene, Robert E. Hogan, Counsel associated with them to enter its appearance as its Attys of record, together with certificate of service for each of above named defendants, filed by Robert E. Hogan

5-22 "Entry of Appearances" of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (successor organization to original defendant. International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America) waiving notice of proceedings herein, entering its appearance generally, for all purposes, consenting to granting of Motion to Modify decree of injunction heretofore entered on Dec.

- 7, 1945, together with certificate of service, filed by counsel for said defendant, Robert E. Hogan
- 5-28 Brief on Behalf of L & N R R Co. concerning questions asked in argument filed by Woodward, Hobson & Fulton
- 5-31 Substitute Page 4 of Brief on behalf of L & N R R [fol. 15] Co., together with letter asking that same be substituted for original page 4 thereof, received from Woodward, Hobson & Fulton and filed
- 6-13 Memorandum on Behalf of Plaintiffs & Intervenor-ers Relative to Questions Arising during argument filed by Marshall P. Eldred
- 7-14 Reply Memorandum filed by Mulholland, Robie & Hickey (Richard R. Lyman)
- 8-7 Memorandum filed by Judge Shelbourne—that motion to modify is overruled and an order so providing will be tendered by Atty. for plaintiffs—Copies to Marshall P. Eldred, Robt. E. Hogan, Mulholland, Robie & Hickey, Schoene & Kramer & Woodward Hobson & Fulton
- 8-9 Order tendered by Marshall P. Eldred
- 8-22 Order signed by Judge Shelbourne 8-22-58 that motion of the dfdts unions to modify the injunctive phase of the "Judgment, Decree and Injunction" is overruled—Cpys to Robt. Hogan, Mulholland, Robie, Hickey, Schoene & Kramer, Woodward, Hobson & Fulton & H. G. Breetz
- 9-16 Notice of Appeal of all defendants except L & N R R Co. filed by Robert E. Hogan, Atty for Appellants; copy of Notice of Appeal mailed to Marshall P. Eldred
- 9-18 Appeal Bond in sum of \$250.00 (The Home Indemnity Co. Surety) filed by Robt. E. Hogan, Atty for all defendants except L & N R R Co.
- 10-16 Order of court (Judge Shelbourne) dated Oct. 16, 1958, extending time for filing record on appeal

and docketing in U. S. Court of Appeals for 6th Circuit to and including Dec. 12, 1958, (Copies mailed to Richard R. Lyman, Robt. E. Hogan, Lester P. Schoene, John P. Sandidge, Marshal P. Eldred and H. B. Breetz)

[fol. 16]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM COMPLAINT—Filed July 16, 1945

For the purposes of this appeal the following portions of the Complaint constitute a fair specimen of the allegations of the entire complaint.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

No. 942

O. V. Wright, Walter E. Lee, Charles C. Teague, J. W. Watkins, Sherman Napier, Will White, Carl W. Bowman, H. B. Simmons, Chester H. Wallace, C. P. Jacobs, E. L. Crutcher, Marion A. Holeman, Ollie Keeling, Joe Hibbard, J. A. McDowell, Delbert W. Cloyd, C. D. Walters, Elvin Norman, W. A. Billingsley, H. F. Starr, W. W. Barnes, L. B. Hines, Malcolm M. Couch, Alf [fol. 17] Lockheart, W. D. Ratliff, C. E. Lake, James L. Williams, J. R. Graham, Plaintiffs,

vs.

System Federation No. 91, Railway Employees' Department, American Federation of Labor,  
J. T. Powell, President, System Federation No. 91  
J. Hugh Wheelchel, Secretary, System Federation No. 91  
International Association of Machinists,  
R. J. May, General Chairman of International Association of Machinists

International Brotherhood of Boilermakers,  
 Iron Ship Builders and Helpers of America,  
 P. G. Williams, General Chairman of International  
 Brotherhood of Boilermakers, Iron Ship Builders and  
 Helpers of America

Sheetmetal Workers International Association,  
 J. Hugh Wheelchel, General Chairman of Sheetmetal  
 Workers International Association

Brotherhood Railway Carmen of America,  
 J. T. Powell, General Chairman of  
 Brotherhood Railway Carmen of America

International Brotherhood of Electrical Workers,  
 T. H. Patterson, General Chairman of International  
 Brotherhood of Electrical Workers

[fol. 18] International Brotherhood of Firemen, Oilers,  
 Helpers, Roundhouse and Railway Shop Laborers,  
 Ray Abner, General Chairman of International  
 Brotherhood of Firemen, Oilers, Helpers,  
 Roundhouse and Railway Shop Laborers

Railroad Lodge No. 205,  
 International Association of Machinists,  
 C. A. Babb, President  
 C. M. Tydings, Secretary  
 K. Heidel, Treasurer  
 O. C. Lee, Committee Chairman  
 H. E. McIntyre, Committeeman  
 Rufus Goodman, Committeeman  
 Frank Berger, Committeeman

Local No. 1073,  
 International Association of Machinists,  
 M. F. Hodge, President  
 W. M. Sharpe, Vice President  
 N. C. Jenkins, Secretary  
 Loyd F. Johnson, Treasurer  
 T. R. Trosper, Committee Chairman  
 Lesley Gooden, Committeeman  
 Rein Teague, Committeeman

Subordinate Lodge No. 102,  
International Brotherhood of Boilermakers,  
Iron Ship Builders and Helpers of America,

W. W. Adams, President  
James C. Lovelace, Vice President  
Russell L. Preston, Secretary  
J. C. Brock, Treasurer  
R. B. McMasters, Committee Chairman  
J. C. Brock, Committeeman  
H. A. Stromier, Committeeman  
[fol. 19] B. C. Elder, Committeeman  
J. D. Hall, Committeeman  
J. M. Wermuth, Committeeman

Pan American No. 576,  
Brotherhood Railway Carmen of America

E. C. Sattich, President  
John J. Sillinger, Secretary  
Herman H. Fox, Treasurer  
W. O. Poteet, Committee Chairman  
Daniel DeWeese, Committeeman  
W. A. Wilson, Committeeman  
Ray Hall, Committeeman

New Bridge Lodge No. 284,  
Brotherhood Railway Carmen of America,

H. P. Scrivner, President  
Pearl Miller, Vice President  
Floyd Neikirk, Secretary  
Stone Glass, Treasurer  
Thomas Blackwell, Committee Chairman  
Pearl Miller, Committeeman  
Ollie Richardson, Committeeman

Local No. 445,  
Sheetmetal Workers International Association,

William T. Sils, President  
Claude McKinnis, Vice President  
William A. Schujahn, Secretary  
M. Fred Canada, Treasurer  
W. R. Denny, Committeeman

Local No. 1004,  
 International Brotherhood of Firemen, Oilers,  
 Helpers, Roundhouse and Railway Shop Laborers,  
 Turner Dever, President  
 John W. Detig, Secretary, Treasurer  
 G. F. Hutchinson, Committee Chairman

[fol. 20] Local No. 362,  
 International Brotherhood of Firemen, Oilers,  
 Helpers, Roundhouse and Railway Shop Laborers,  
 Edgar Hamblin, President  
 Ed. Noe, Vice President  
 Garfield Carroll, Financial Secretary  
 W. C. Stephens, Recording Secretary  
 A. M. Jones, Treasurer  
 W. M. Harman, Committee Chairman  
 H. L. Disney, Committeeman  
 George Broughton, Committeeman

Local Union No. 1353,  
 International Brotherhood of Electrical Workers,  
 T. H. Patterson, President  
 H. B. Cherry, Vice President  
 F. C. Doutrick, Treasurer  
 J. F. Schietinger, Recording Secretary  
 C. H. Fortenberry, Committee Chairman  
 Richard McDaniel, Committeeman

Louisville & Nashville Railroad Company, Defendants.

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 This action arises under the Act of Congress of June 21, 1934, 48 Stat. 1185, 45 U.S.C.A., ch. 8, being an act to regulate interstate commerce; 28 U.S.C.A., sec. 41(8); Federal Rule of Procedure, Rule 57, 28 U.S.C.A., sec. 723; 28 U.S.C.A., sec. 400.

The plaintiffs hereinabove named joined in this action against the defendants hereinabove named because their several causes of action arise out of the same series of transactions or occurrences, and questions of law and ques-  
 [fol. 21] tions of fact common to all of the plaintiffs and all of the defendants will arise in this action. •



## Count I

1.1 The plaintiff, O. V. Wright, states that he resides at 4103 Southern Parkway, Louisville, Kentucky, and is employed as a boiler inspector by the Louisville & Nashville Railroad Co. in its South Louisville Roundhouse; that he has been employed by said company for 35 years, the last 17 years of which he has performed his duties as a boiler inspector, without complaint as to the manner of performing his work from either his employer or the labor organization representing his craft; and that he is a member of the boilermakers craft or class of employees.

1.2 The defendant, System Federation No. 91, Railway Employees' Department, American Federation of Labor (hereinafter called the Federation), is an unincorporated association or labor union, all of whose members are employees of the Louisville & Nashville Railroad Co. and are likewise members of one or the other of the following labor unions, each of which is an international unincorporated association whose members are employed by the Louisville & Nashville Railroad Co. and other interstate railroads, and each of which is composed of various local lodges or units located at various points upon the Louisville & Nashville Railroad Co. and other interstate railroads, each of which local lodges or units is an unincorporated association whose members are employees of the Louisville & Nashville Railroad Co. or of the particular railroad upon which said local is located, said labor unions operating through the Federation being the following: International Association of Machinists (hereinafter called the Machinists Union), International Brotherhood of Boilermakers; Iron Ship Builders and Helpers of America (hereinafter called the Boilermakers Union), Sheetmetal Workers International Association (hereinafter called the Sheetmetal Workers Union), Brotherhood Railway Carmen of America (hereinafter called the Carmen Union), International Brotherhood of Electrical Workers (hereinafter called the Electricians Union), and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers (hereinafter called the

Firemen & Oilers Union). The principal office and place of business of the Federation is located in Louisville, Kentucky, and the president and secretary of the Federation are respectively J. T. Powell and J. Hugh Welchel, both residents of Louisville, Kentucky. The members of the Federation are so numerous as to make it impracticable to bring them all before the Court. The defendants, J. T. Powell and J. Hugh Welchel are representative of all the members of the Federation whose interests in this case will be adequately represented by said defendants. Said defendants are sued herein individually, as officers of the Federation and as representatives of its entire membership.

1.3 The defendant, Subordinate Lodge No. 102 is a subordinate lodge or local unit of the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, and is located in Louisville, Kentucky. The defendants, W. W. Adams, James C. Lovelace, Russell L. Preston and J. C. Brock are respectively the president, vice-president, secretary and treasurer of Subordinate Lodge No. 102, and are all residents of Louisville, Kentucky. The defendants, R. B. McMasters, as chairman, and J. C. Brock, B. C. Elder, J. D. Hall, J. M. Wermuth and H. A. Stromier comprise the committee of said local, and all are residents of Louisville, Kentucky. The members of the International Brotherhood of Boilermakers, [fol. 23] Iron Ship Builders and Helpers of America and of Subordinate Lodge No. 102, are so numerous as to make it impracticable to bring them all before the Court. The defendants, W. W. Adams, James C. Lovelace, Russell L. Preston, J. C. Brock, R. B. McMasters, B. C. Elder, J. D. Hall, J. M. Wermuth and H. A. Stromier are representative of all the members of Subordinate Lodge No. 102 and of the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, whose interests in this case will be adequately represented by said defendants. Said defendants are sued herein individually, as officers of said local and as representatives of the entire membership of said local and the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America.



1.4 The defendant, Louisville & Nashville Railroad Co. (hereinafter called the Railroad), is a Kentucky corporation with its chief office and place of business in Louisville, Kentucky.

1.5 Since August of 1940, and under the provisions of the Railway Labor Act, the defendant Boilermakers Union, operating through and by the defendant Federation, has been and is now the exclusive bargaining agent and representative of the entire craft or class of the employees of the defendant Railroad employed as boilermakers and in related capacities, and as such, was and is now under a duty to represent all the members of said craft or class, regardless of whether they are members of defendant Boilermakers Union, fairly, impartially and in good faith, and to refrain from making against the minority members of the craft (who are not members of the defendant Boilermakers Union) hostile discriminations not based on relevant differences. Notwithstanding their duties under the Railway Labor Act, the defendants Federation, Boilermakers Union and all of its locals have consistently violated the purpose, terms and provisions of said act by practicing against the minority members of the boilermakers craft, who were and are not members of said labor organizations, acts of hostile discrimination for the purpose of giving preference to members of the craft who are members of said organizations, and for no other reason, as hereinafter more fully appears. Said defendants have further violated said act in that they have consistently pursued toward the minority members of the boilermakers craft, who are not members of said labor organizations, a policy calculated to limit the freedom of association among said employees, force them into joining their labor organizations and put into effect upon the defendant Railroad a virtual closed shop.

1.6 Under the terms and provision of Railway Labor Act and at all times material herein, the defendant Railroad was and is now under a duty to treat fairly and impartially all of its employees according to their seniority rights and ability and in keeping with working agreements

regularly adopted by the defendant Railroad and the duly elected bargaining representatives of its employees. Said act imposes on defendant Railroad a duty to refrain from making hostile discriminations against any of its employees because of their refusal to become or to remain a member of any certain labor organization. Notwithstanding its duties under the Railway Labor Act, the defendant Railroad has consistently violated the purpose, terms and provisions of said act by practicing against the minority members of the boilermakers craft, who were and are not members of the defendants Federation, Boilermakers Union and its locals, acts of hostile discrimination and by giving preference to its employees who are members of said labor organization, as hereinafter more fully appears. [fol. 25] The defendant Railroad has further violated said act in that it has consistently pursued toward its employees who are not members of the defendants Federation, Boilermakers Union and its locals a policy calculated to limit the freedom of association among said employees and to influence or coerce said employees in an effort to induce them to join or remain members of the defendants Federation, Boilermakers Union and its locals.

1.7 The defendants Federation, Boilermakers Union, all of its locals and the defendant Railroad have severally and jointly, by concurring each with the other, violated their duties under the Railway Labor Act in that they have, with respect to employees in the boilermakers craft who were not members of said labor organizations, denied said employees the right to bid on vacancies, the right to promotion to higher jobs or preferred jobs, the right to work overtime at punitive rate of pay and other rights as more fully appears hereinafter.

1.8 Prior to February 4, 1945, plaintiff, O. V. Wright, under an individual contract of employment with the defendant Railroad, was working on a job that was assigned to him on a 7-day basis, that is to say, he was working seven days a week at straight time. At all times material herein said plaintiff was not and is not now a member of defendant Boilermakers Union or any of its locals. With-

out notice to him, an agreement was entered into between defendant Railroad and defendants Federation and Boilermakers Union whereby all 7-day assigned jobs were abolished on said Railroad as of February 4, 1945, from and after which date all Sunday and holiday work was to be classified as overtime work and paid for at the rate of time and one-half. Under an agreement then and still remaining in effect between said defendants, the effective [fol. 26] date of which was September 1, 1943, overtime must be distributed as equally as possible among employees as far as the character of work permits and a record must be kept of overtime worked in order to distribute the overtime as equally as possible. It was provided further that an overtime call list should be drawn by mutual agreement between the officer in charge (representing the management) and the committee (representing the union).

1.9 For a period of approximately three years, plaintiff, O. V. Wright, has been denied his proportionate share of overtime work which, since February 4, 1945, includes work to be performed on Sundays and holidays, in violation of the agreement referred to above, for the sole reason that he is not a member of and refuses to join defendants Boilermakers Union and Subordinate Lodge No. 102, notwithstanding he has been able, qualified and willing to work overtime; that such denial is the loss of a valuable property right, and that unless this Honorable Court grants him relief, he will not be permitted to work overtime and receive time and one-half pay as compensation therefor and will suffer irreparable damage. This plaintiff already has been damaged by reason of the foregoing in the amount of at least \$5000.00.

1.10 Plaintiff, O. V. Wright, has complained of the foregoing discrimination to defendant Railroad and to defendant Subordinate Lodge No. 102, and has requested the handling of his grievance by the committee of said local, but without obtaining any results or relief or the overtime work to which he is entitled. The plaintiff, O. V. Wright, does not have available to him an adequate administrative remedy and unless this Honorable Court will hear

and determine this cause and grant the relief hereinafter prayed, this plaintiff will be unable to obtain relief from [fol. 27] the acts of hostile discrimination practiced against him and will continue to suffer irreparable injury.

1.11 Plaintiff, O. V. Wright, brings this action in his individual right and for his own benefit and likewise sues herein on behalf of the class he represents, namely all employees of the craft of boilermakers employed by the defendant Railroad who are not members of the defendants Federation, Boilermakers Union or any subordinate lodge thereof and whose rights and privileges as employees of defendant Railroad have been denied, taken away, or abridged by the defendants Federation, Boilermakers Union or any subordinate lodge thereof, and by the defendant Railroad by separate acts of discrimination or by acts of discrimination done in concert with one or more of the other defendants, and for the sole reason that said employees did not join or retain their membership in said labor organization. Said employees are so numerous as to make it impracticable to bring them all before the court. This plaintiff is fairly representative of said employees and their interests in this case will be adequately represented by this plaintiff. The rights of said employees and of this plaintiff are several, but said rights are affected by a common question of law and a common question of fact, and common relief is sought for all.

1.12 In this case an actual controversy exists between this plaintiff and the class he represents on the one hand and the defendants Federation, Boilermakers Union and Subordinate Lodge No. 102 and the class represented by them, and the defendant Railroad on the other hand. The interests of this plaintiff and the class he represents are adverse to the interests of said defendants and those they represent; said plaintiffs have already suffered irreparable injury and will suffer further irreparable injuries [fol. 28] unless this Honorable Court grants the relief hereinafter prayed and will declare the rights, interests and other legal relations of the respective parties as provided

in 28 U.S.C.A., sec. 400 and Rule 57 of the Federal Rules of Civil Procedure.

### Count VIII

8.1 The plaintiff, H. B. Simmons, stated that he resides at Buechel, Kentucky, and is employed as a machinist by defendant Railroad at its South Louisville roundhouse; that he had been employed by said Company for twenty-five years without complaint as to the manner of performing his work from either his employer or the labor organization representing his craft; that he is a member of the machinist craft or class of employees.

8.2 This plaintiff, by reference, hereby adopts all the allegations of paragraph 1.2 of *Count I*.

8.3 The defendant, R. J. May, is General Chairman of the International Association of Machinists, and is a resident of Louisville, Kentucky. The defendant Railroad Lodge No. 205 is a subordinate lodge or local unit of the International Association of Machinists and is located in Louisville, Kentucky. The defendants C. A. Babb, C. M. Tydings, K. Heidel are respectively the President, Secretary and Treasurer of Railroad Lodge No. 205, and are all residents of Louisville, Kentucky. The defendants O. C. Lee, as Chairman, and H. E. McIntyre, Rufus Goodman, and Frank Berger comprise the committee of Railroad Lodge No. 205 and all are residents of Louisville, Kentucky. The members of the International Association of Machinists and of Railroad Lodge No. 205 are so numerous as to make it impracticable to bring them all before the court. The defendants R. J. May, C. A. Babb, [fol. 29] C. M. Tydings, K. Heidel, O. C. Lee, H. E. McIntyre, Rufus Goodman and Frank Berger are representative of all the members of the International Association of Machinists and Railroad Lodge No. 205, whose interests in this case will be adequately represented by said defendants. Said defendants are sued herein individually, as officers of said unions, and as representatives of the entire membership thereof.



8.4 This plaintiff, by reference, hereby adopts all the allegations of paragraph 1.4 of *Count I*.

8.5 Since August of 1940, and under the provisions of the Railway Labor Act, the defendant Machinists Union, operating through and by the defendant Federation, has been and is now the exclusive bargaining agent and representative of the entire craft or class of the employees of the defendant Railroad employed as machinists and in related capacities, and as such, was and is now under a duty to represent all the members of said craft or class, regardless of whether they are members of defendant Machinists Union, fairly, impartially and in good faith, and to refrain from making against the minority members of the craft (who are not members of the defendant Machinists Union) hostile discriminations not based on relevant differences. Notwithstanding their duties under the Railway Labor Act, the defendants Federation, Machinists Union and all of its locals have consistently violated the purpose, terms and provisions of said act by practicing against the minority members of the machinists craft, who were and are not members of said labor organizations, acts of hostile discrimination for the purpose of giving preference to members of the craft who are members of said organizations, and for no other reason, as hereinafter more fully appears. Said defendants have [fol. 30] further violated said act in that they have consistently pursued toward the minority members of the machinists craft, who are not members of said labor organizations, a policy calculated to limit the freedom of association among said employees, force them into joining their labor organization and put into effect upon the defendant Railroad a virtual closed shop.

8.6 Under the terms and provisions of Railway Labor Act and at all times material herein, the defendant Railroad was and is now under a duty to treat fairly and impartially all of its employees according to their seniority rights and ability and in keeping with working agreements regularly adopted by the defendant Railroad and the duly elected bargaining representatives of its employ-

ees. Said act imposes on defendant Railroad a duty to refrain from making hostile discriminations against any of its employees because of their refusal to become or to remain a member of any certain labor organization. Notwithstanding its duties under the Railway Labor Act, the defendant Railroad has consistently violated the purpose, terms and provisions of said act by practicing against the minority members of the machinists craft, who were and are not members of the defendants Federation, Machinists Union and its locals, acts of hostile discrimination and by giving preference to its employees who are members of said labor organizations, as hereinafter more fully appears. The defendant Railroad has further violated said act in that it has consistently pursued toward its employees who are not members of the defendants Federation, Machinists Union and its locals a policy calculated to limit the freedom of association among said employees and to influence or coerce said employees in an effort to induce them to join or remain members of the defendants, Federation, Machinists Union and its locals.

[fol. 31] 8.7 The defendants Federation, Machinists Union, all of its locals and the defendant Railroad have severally and jointly, by concurring each with the others, violated their duties under the Railway Labor Act in that they have, with respect to employees in the machinists craft who were not members of said labor organizations, denied said employees the right to bid on vacancies, the right to promotion to higher jobs or preferred jobs, the right to work overtime at punitive rate of pay and other rights as more fully appears hereinafter.

8.8 At all times material herein, the plaintiff, H. B. Simmons, was not and is not now a member of defendant Machinists Union or any of its locals. Since the defendant Machinists Union, acting through and by the defendant Federation, became the exclusive bargaining agent and representative of the Machinists craft of defendant Railroad in the year 1940, this plaintiff has been denied the right of promotion to the job of lead-man in connection with his work as an air-brake inspector, notwithstanding

the fact that this plaintiff has been, and is now able, qualified; and willing to work as a lead-man, which job pays 10¢ an hour higher rate of compensation than that paid to this plaintiff as an air-brake inspector, for the sole and only reason that this plaintiff refuses to join the defendants Machinists Union and Railroad Lodge No. 205.

8.9 Since the year 1940, plaintiff, H. B. Simmons, has been denied his proportionate share of overtime work, contrary to the provisions of an agreement affecting his craft, and entered into between defendant Railroad and defendants Federation and Machinists Union, the effective date of which was September 1, 1943, under the terms of which overtime must be distributed as equally as possible among employees as far as the character of the work permits and [fol. 32] a record must be kept of overtime work in order to distribute same as equally as possible. Said agreement further provides that an overtime call list should be drawn by mutual agreement between the officer in charge (representing the management) and the committee (representing the union). This plaintiff has been denied his proportionate share of overtime work, notwithstanding the fact that he has been able, qualified, and willing to perform such work. Such denial is the loss to this plaintiff of a valuable property right and unless this Honorable Court grants him relief, he will not be permitted to receive his proportionate share of overtime work and time and one-half pay as compensation therefor, and will suffer irreparable damage. This plaintiff has already been damaged by reason of the foregoing, and the matters alleged in paragraph 8.8 above, in the amount of at least Five Thousand Dollars (\$5,000.00).

8.10 The plaintiff, H. B. Simmons, does not have available to him an adequate administrative remedy, and unless this Honorable Court will hear and determine this cause, and grant the relief hereinafter prayed, this plaintiff will be unable to obtain relief from the acts of hostile discrimination practiced against him, and will continue to suffer irreparable injury.



8.11 Plaintiff, H. B. Simmons, brings this action in his individual right and for his own benefit and likewise sues herein on behalf of the class he represents, namely all employees of the craft of machinists employed by the defendant Railroad who are not members of the defendants Machinists Union or any subordinate lodge thereof and whose rights and privileges as employees of defendant Railroad have been denied, taken away, or abridged by the defendants Federation, Machinists Union or any sub-[fol. 33] ordinate lodge thereof, and the defendant Railroad by separate acts of discrimination or by acts of discrimination done in concert with one or more of the other defendants, and for the sole reason that said employees did not join or retain their membership in said labor organization. Said employees are so numerous as to make it impracticable to bring them all before the court. This plaintiff is fairly representative of said employees and their interests in this case will be adequately represented by this plaintiff. The rights of said employees and of this plaintiff are several, but said rights are affected by a common question of law and a common question of fact, and common relief is sought for all.

8.12 In this case an actual controversy exists between this plaintiff and the class he represents on the one hand and the defendants Federation, Machinists Union and Railroad Lodge No. 205 and the class represented by them, and by the defendant Railroad on the other hand. The interests of this plaintiff and the class he represents are adverse to the interests of said defendants and those they represent, said plaintiffs have already suffered irreparable injury and will suffer further irreparable injuries unless this Honorable Court grants the relief hereinafter prayed and will declare the rights, interest and other legal relations of the respective parties as provided in 28 U.S.C.A., Sec. 400 and Rule 57 of the Federal Rules of Civil Procedure.

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## Count XIV

14.1 The plaintiff, Joe Hibbard, states that he resides at Otas, Kentucky, and he is employed as a machinist's helper by defendant Railroad in its shops at Corbin, Kentucky, that he has been employed in said capacity for nine [fol. 34] years without complaint as to the manner of performing his work from either his employer or the labor organization representing his craft; that he is a member of the machinist craft or class of employees.

14.2 This plaintiff, by reference, hereby adopts all the allegations of paragraph 1.2 of *Count I*.

14.3 The defendant, R. J. May, is General Chairman of the International Association of Machinists and is a resident of Louisville, Kentucky. The defendant, Local No. 1073, is a subordinate lodge or local unit of the International Association of Machinists and is located in Corbin, Kentucky. The defendants, M. F. Hodge, W. M. Sharpe, N. C. Jenkins, Loyd F. Johnson are respectively the President, Vice-President, Secretary and Treasurer of Local No. 1073, and all are residents of Corbin, Kentucky. The defendants, T. R. Trosper as chairman, and Lesley Gooden and Rein Teague comprise the committee of Local No. 1073 and all are residents of Corbin, Kentucky. The members of the International Association of Machinists and of Local No. 1073 are so numerous as to make it impracticable to bring them all before the court. The defendants, R. J. May, M. F. Hodge, W. M. Sharpe, N. C. Jenkins, Loyd F. Johnson, T. R. Trosper, Lesley Gooden and Rein Teague are representative of all members of the International Association of Machinists and of Local No. 1073, whose interests in this case will be adequately represented by said defendants. Said defendants are sued herein individually, as officers of said unions, and as representatives of the entire membership thereof.

14.4 This plaintiff, by reference, hereby adopts all the allegations of paragraph 1.4 of *Count I*.

[fol. 35] 14.5 This plaintiff, by reference, hereby adopts all the allegations of paragraph 8.5 of *Count VIII*.

14.6 This plaintiff, by reference, hereby adopts all the allegations of paragraph 8.6 of *Count VIII*.

14.7 This plaintiff, by reference, hereby adopts all the allegations of paragraph 8.7 of *Count VIII*.

14.8 Since August of 1940, defendant Machinists Union, acting by and through the defendant Federation, has been the exclusive bargaining agent and representative of the machinist craft of defendant Railroad. At all times material herein this plaintiff has not been and is not now a member of defendant Machinists Union or any of its locals. Since defendant Machinists Union became the exclusive bargaining agent and representative for the machinist craft of employees of defendant Railroad, this plaintiff was upgraded in his department so that he was receiving for his work top rate of pay, to wit, \$1.0572 per hour, which is the compensation of upgraded helpers. Helpers' pay was .7932 per hour. At all times he was and is now able, qualified and willing to perform top grade work. Notwithstanding this, however, this plaintiff was taken off of top grade work and reduced to his former job at its regular rate of pay, for the sole and only reason that he was not a member of, and refused to join defendant Local No. 1073. Following this plaintiff's demotion, other helpers in his department who were junior in point of service to this plaintiff, were upgraded to perform said work, not because they were any better qualified to perform said work than this plaintiff, but because they were and are members of defendant Local No. 1073. Such denial to this plaintiff of the right of promotion to top grade work in his department is a loss to him of a valuable property right, resulting to him in irreparable injury.

[fol. 36] 14.9 Since the year 1940, plaintiff, Joe Hibbard, has been denied his proportionate share of overtime work, contrary to the provisions of an agreement affecting his craft, and entered into between defendant Railroad and de-

fendants, Federation and Machinists Union, and more fully alleged in paragraph 8.9 of *Count VIII*. This plaintiff has been denied his proportionate share of overtime work, notwithstanding the fact that he has been able, qualified and willing to perform same. Such denial is the loss to him of a valuable property right and unless this Honorable Court grants him relief, he will not be permitted to receive his proportionate share of overtime work, and compensation therefor at the rate of time and one-half and will suffer irreparable damage. This plaintiff has already been damaged by reason of the foregoing and the matters alleged in paragraph 14.8 above in the amount of at least Five Thousand Dollars (\$5,000.00).

14.10 The plaintiff, Joe Hibbard, does not have available to him an adequate administrative remedy, and unless this Honorable Court will hear and determine this cause, and grant the relief hereinafter prayed, this plaintiff will be unable to obtain relief from the acts of hostile discrimination practiced against him, and will continue to suffer irreparable injury.

14.11 This plaintiff, by reference, hereby adopts all the allegations of paragraph 8.11 of *Count VIII*, substituting his name for that of the plaintiff, H. B. Simmons.

14.12 This plaintiff, by reference, hereby adopts all the allegations of paragraph 8.12 of *Count VIII*.

WHEREFORE, all the plaintiffs hereinabove named pray as follows:

[fol. 37] 1. For a declaratory judgment binding on all the parties hereto and their privies, settling and declaring the rights, interests and legal relations of the respective parties in and to and by reason of the matters hereinabove detailed.

2. For a declaratory judgment decreeing and declaring that the defendants Federation, Boilermakers Union, Machinists Union, Carmen Union, Sheetmetal Workers

Union, Electricians Union and Firemen and Oilers Union, and all of their subordinate lodges and locals situated upon, or having any jurisdiction over any employees of, the defendant Railroad, in accepting the position of and acting as the exclusive bargaining agents and representatives under the Railway Labor Act of the crafts or classes of boilermakers, machinists, carmen, sheetmetal workers, electricians, stationary firemen and oilers, roundhouse and railway shop laborers, employed by defendant Railroad, assumed and are under the obligation and duty to represent fairly, impartially and without discrimination, all of the members of said crafts or classes who are not members of defendant labor organizations, and to recommend to defendant Railroad indiscriminately all of said employees for promotion, for leave of absence, for protection of seniority, for overtime work and for all other rights or benefits of an individual contract of employment with defendant Railroad, which recommendations shall be in keeping with the regularly adopted working agreements between defendant Railroad and the duly elected bargaining agents of the several crafts, but without regard to whether said employees or any of them join or retain their membership in any of said defendant labor organizations or in any labor organization.

3. For a declaratory judgment decreeing and declaring [fol. 38] ing that the plaintiffs and all other minority members employed by defendant Railroad in the boilermakers, machinists, carmen, sheetmetal workers, electricians, and stationary firemen, oilers, roundhouse and railway shop laborers crafts or classes who are not members of defendants Federation, Boilermakers Union, Machinists Union, Carmen Union, Sheetmetal Workers Union, Electricians Union, and Firemen and Oilers Union, or any subordinate lodge or local thereof, are entitled to promotion to preferred jobs or to jobs in a higher classification paying a higher rate of pay, to proper protection of their seniority, to bid on vacancies, to leaves of absence with proper protection of seniority, and to receive their proportionate share of overtime work and compensation therefor, based upon their ability, seniority, and willingness to perform their



duties, irrespective of and without regard to whether said employees join or retain their membership in any of said defendant labor organizations or in any labor organization.

4. For a declaratory judgment decreeing and declaring that the defendant Railroad, under the Railway Labor Act, is under a duty and obligation to treat fairly, impartially and without discrimination all of its employees and to assure to all of its employees the right to bid on vacancies, to leaves of absence with proper protection of seniority, to promotion to preferred jobs or jobs in a higher classification with a higher rate of pay, to proper protection of their seniority and to their proportionate share of overtime work and compensation therefor and to receive the benefits of said rights based upon ability, seniority, and willingness to perform such work, irrespective of and without regard to whether said employees, or any of them, are members of any of defendant labor organizations or of any labor organization.

[fol. 39] 5. For a preliminary and permanent injunction against the defendants Federation, Boilermakers Union, Machinists Union, Carmen Union, Sheetmetal Workers Union, Electricians Union, and Firemen and Oilers Union, all of their officers, agents, and members, and all of their subordinate lodges or locals situated upon or having any jurisdiction over any employees of the defendant Railroad, and their officers, agents, and members, and against the defendant Railroad, perpetually restraining and enjoining them, and each of them, from requiring as a condition to receiving promotion, leaves of absence, protection of seniority, overtime work and any and all rights or benefits which may arise out of an individual contract of employment between defendant Railroad and any one of its employees, that plaintiffs and the classes represented by them or any one of them, join or retain their membership in any of said defendant labor organizations or any labor organization; perpetually restraining and enjoining them, and each of them, from denying to the plaintiffs and the classes represented by them or any one of them, promotion to a

preferred job or to a job in a higher classification with a higher rate of pay, leaves of absence, protection of seniority, overtime work, or any rights or benefits arising from an individual contract of employment between defendant Railroad and any one of its employees, for the sole and only reason that they or any one of them are not members of or refuse to retain their membership in any one of said defendant labor organizations or any labor organization; and perpetually restraining and enjoining them; and each of them, from failing to recommend for or to award to the plaintiffs and the classes represented by them or any of them promotion to preferred jobs or jobs in a higher classification with a higher rate of pay, leaves of absence, proper protection of seniority, overtime work or any other right or benefit arising out of any individual [fol. 40] contract of employment between defendant Railroad and any one of its employees, for the sole and only reason that said employees refuse to join or retain their membership in any one of said defendant labor organizations or any labor organization.

6. For a judgment awarding each of the plaintiffs judgment against all of the defendants, jointly and severally, in the amount of \$5,000.00.

7. For a judgment for their costs herein expended and for all other proper, lawful and equitable relief to which they may be entitled.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attorneys for Plaintiff.

602 Kentucky Home Life Bldg.,  
Louisville, Ky.



[fol. 41]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

No. 942

O. V. WRIGHT, et al., Plaintiffs,

vs.

SYSTEM FEDERATION No. 91, EMPLOYEES' DEPARTMENT,  
AMERICAN FEDERATION OF LABOR, et al., Defendants.

JUDGMENT, DECREE AND INJUNCTION—Entered  
December 7, 1945

By consent and agreement of all parties to this action,  
it is ordered, adjudged and decreed as follows:

That the defendants, other than the defendant Railroad, and all of the subordinate lodges and locals of the defendant Unions, acting as the duly designated and authorized representatives of any employees of defendant Railroad, are, in accordance with the provisions of the Railway Labor Act and in accordance with the duly adopted bargaining agreements between the defendant Railroad and defendant Unions, under the obligation and duty to represent and treat fairly and impartially, and without discrimination based on membership or non-membership in any labor organization, all members of the crafts or classes of boilermakers, machinists, carmen, sheet metal workers, electricians, power house employees and railway [fol. 42] shop laborers, including the plaintiffs to this action, without regard to whether said employees, or any of them, are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization;

That the defendant Railroad, in accordance with the provisions of the Railway Labor Act and in accordance with the duly adopted bargaining agreements between the said Railroad and the defendant Unions, is under the duty

and obligation to refrain from discrimination against its employees in the crafts or classes of boilermakers, machinists, carmen, sheet metal workers, electricians, power house employees and railway shop laborers, including the plaintiffs to this action, because of or by reason of the failure or refusal of said employees to join or retain their membership in any of defendant labor organizations, or in any labor organization;

That the plaintiffs in this action and all other employees of the defendant Railroad employed in the boilermakers, machinists, carmen, sheet metal workers, electricians, power house employees and railway shop laborers crafts or classes, who are not members of the defendant labor organizations, or any subordinate lodge or local thereof, shall from and after the date hereof and in accordance with the collective bargaining agreements, be entitled, irrespective and without regard to whether said employees, or any of them, are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization, to the rights of promotion to preferred jobs, to jobs in a higher classification paying a higher rate of pay, to proper protection of seniority, to bid on or be assigned to vacancies, to leaves of absence with proper protection of seniority and to their [fol. 43] proper share of overtime work and compensation therefor, as provided for in such agreements now in effect or that may hereafter be in effect in accordance with the Railway Labor Act;

That all of the defendants, and all of the subordinate lodges and locals of the defendant Unions acting as the duly designated and authorized representatives of any employees of defendant Railroad, their officers, agents employees and members, and the defendant Railroad, be and they are hereby enjoined from requiring that the plaintiffs and the classes represented by them in this action join or retain their membership in any of said defendant labor organizations, or any labor organization, as a condition to receiving promotion, leaves of absence, proper protection of seniority, overtime work and any other rights or benefits which may arise out of or be in accordance with the

regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the Railway Labor Act; and are enjoined from denying to said plaintiffs, or the classes represented by them in this action, promotion to such preferred jobs, jobs in a higher classification with a higher rate of pay, leaves of absence, proper protection of seniority, overtime work or any other right or benefit arising out of or in accordance with the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, for the sole and only reason that the plaintiffs or the classes represented by them in this action are not members of or refuse to join or to retain their membership in any of said defendant labor organizations, or any labor organizations; and they are further [fol. 44] ther enjoined, in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may be hereafter in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of defendant labor organizations, or any labor organization;

That one-half the costs of this action be paid by defendant Railroad and the other half thereof be paid by the defendant Unions.

The Court retains control of this action for the purpose of entering such further orders as may be deemed necessary or proper.

Approved: Dec. 7, 1945 .

Shackelford Miller, Jr., Judge United States District Court, Western District of Kentucky.

Brown and Eldred, Attorneys for Plaintiffs.

Woodward Dawson Hobson & Fuiton, Attorneys for Defendant Railroad.

Mulholland, Robie & McEwen, and Robert E. Hogan, Attorneys for all defendants other than Defendant Railroad.

A Copy—Certified.

W. T. Beckham, Clerk, By M. H. Hogan, Deputy Clerk.

[fol. 45]

IN UNITED STATES DISTRICT COURT

MOTION TO MODIFY INJUNCTION—Filed July 2, 1957

Now come the defendants System Federation No. 91, Railway Employees' Department, A.F.L.-C.I.O. (formerly known as System Federation No. 91, Railway Employees' Department, American Federation of Labor), International Association of Machinists, Sheet Metal Workers' International Association, Brotherhood Railway Carmen of America, International Brotherhood of Electrical Workers, and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, and move the Court, pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure, to modify its decree of injunction hereinbefore entered, under date of December 7, 1945, against these and other defendants, by adding to and incorporating therein a proviso to the effect that it shall not operate to prohibit defendants, or any of them from negotiating, entering into, or applying and enforcing, any agreement or agreements authorized by Section 2, Eleventh of the Railway Labor Act, as amended January 10, 1951.

As grounds for said motion these defendants state as follows:

1. The complaint herein, which resulted in the consent decree of injunction of December 7, 1945, was based on alleged acts of discrimination against non-members of the defendant labor organizations, in the matter of their promotion, seniority, overtime, leave of absence and other

rights under the collective bargaining agreements applicable to the involved crafts or classes of defendant Railroad's employees, because of their failure or unwillingness to join or retain their membership in the defendant labor organizations.

[fol.46] 2. At the time of institution of this action, and entry of the decree of injunction, the Railway Labor Act (45 U.S.C., Sec. 151 et seq.) and particularly Section 2, Fourth and Fifth thereof, made it unlawful for carriers to interfere in any way with the organization of their employees, or to coerce or compel their employees to join or remain or not to join or remain members of any labor organization, and such prohibitions were generally construed as creating an "open shop" in the railroad industry, and making unlawful closed shop, union shop or other forms of union security agreements.

3. By Act of January 10th, 1951 (64 Stat. 1238; 45 U.S.C. 152, Eleventh) the Congress of the United States amended the Railway Labor Act to permit, within defined limits, the making of union security agreements by carriers subject to the Act, said amendment reading as follows:

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such con- [fol.47] dition of employment with respect to employees

to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing<sup>ed</sup> the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the [fol. 48] First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organiza-



tion other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting membership employees of a craft or class in any of said services.

“(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.”

The lawfulness of union security agreements negotiated pursuant to such amendment has been upheld in *Railway Employees' Department, A.F.L. v. Hanson*, 351 U.S. 225 (May 21, 1956).

[fol. 49] 4. These defendants, and other labor organizations representing different crafts and classes of defendant Railroad's employees, are currently seeking to negotiate and place into effect, with respect to the employees of defendant Railroad represented by them under said Railway Labor Act, an agreement or agreements requiring the employees so represented, as a condition of their continued employment, to become and remain members of the organizations representing their respective crafts, subject to all of the limitations and conditions prescribed in the above-quoted Section 2, Eleventh, of said Act as amended; but defendant Railroad has refused to negotiate for such an agreement or agreements with these defendants and with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and



Helpers, successor organization to the original defendant International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, for the asserted reason that it fears that to do so would subject it and such defendant labor organizations to charges of contempt for violation of said decree of injunction of December 7, 1945.

5: Said 1951 amendment to the Railway Labor Act terminated, to the extent specified therein, plaintiffs' right to be free from the requirements of union security agreements, and it is no longer equitable that said decree of injunction should have prospective application to prohibit defendants from negotiating such agreements pursuant to express Congressional authorization.

Wherefore, these defendants pray the Court, upon hearing of the aforesaid motion, to enter an order sustaining it and modifying said permanent injunction of December 7, 1945, so that it shall have no prospective application to prohibit defendants, or any of them, from negotiating, entering into, or applying and enforcing, any agreement or agreements authorized by Section 2, Eleventh, of the Railway Labor Act, as amended January 10, 1951.

Robert E. Hogan, Kentucky Home Life Building, Louisville, Kentucky; Clarence M. Mulholland, 741 National Bank Building, Toledo 4, Ohio; Richard R. Lyman, 741 National Bank Building, Toledo 4, Ohio; Attorneys for defendants System Federation No. 91, Railway Employees' Department, A.F.L.-C.I.O., International Association of Machinists, Sheet Metal Workers' International Association, Brotherhood Railway Carmen of America, International Brotherhood of Electrical Workers, and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

[fol. 55]

## IN UNITED STATES DISTRICT COURT

MOTIONS OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY  
IN RESPONSE TO THE MOTION OF CERTAIN DEFENDANT  
UNIONS TO MODIFY THE INJUNCTION—Filed July 9, 1957

I. Comes the Louisville & Nashville Railroad Company and for its response to the motion of the defendants, System Federation No. 91, Railway Employees' Department, [fol. 56] A.F.L.-C.I.O. (formerly known as System Federation No. 91, Railway Employees' Department, American Federation of Labor), International Association of Machinists, Sheet Metal Workers' International Association, Brotherhood Railway Carmen of America, International Brotherhood of Electrical Workers, and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers (hereinafter known as defendant Unions), states as follows:

(a) The Louisville & Nashville Railroad Company *objects to the motion to modify* the decree of injunction because the defendant Unions *have failed to follow the provisions concerning class actions as set forth in Rule 23*, and the Louisville & Nashville Railroad Company moves the Court pursuant to Rule 23 (c), Federal Rules of Civil Procedure, that the defendant Unions *be required in such manner as the Court directs to give notice to all the classes and crafts represented by the plaintiffs herein in such manner as the Court may direct* of the proposed modification of the judgment for the following reasons:

(1) The Louisville & Nashville Railroad Company states that in the original action there were twenty-eight named plaintiffs employed by the Railroad in the various states in which it operates as shown by the Complaint who prosecuted same in behalf of themselves and all other employees of this defendant similarly situated employed in the boiler-maker, machinist, carmen, sheet metal workers, electricians, power house employees and railway shop laborers' crafts or classes in the states where the Railroad operates; that this action was assigned and prepared for trial, and there

was a consent judgment, decree, and injunction entered herein defining the duties of the moving defendant Unions, the International Brotherhood of Boilermakers, Iron Ship [fol. 57] Builders and Helpers of America, and this defendant and the rights of the named plaintiffs and all other employees of this defendant employed in said crafts and classes who were not members of any of the said labor organizations.

(2) The Louisville & Nashville Railroad Company says that thirteen of the said named plaintiffs, to wit: O. V. Wright, Chas. C. Teague, Will White, H. B. Simmons, Ollie Keeling, Joe Hibbard, *J. A. McDowell*, W. A. Billingsley, W. W. Barnes, Malcom M. Couch, W. D. Ratliff, *J. R. Graham* and H. F. Starr, *are not now employed by this defendant in its service.* The Railroad further states on information and belief that *others of the twenty-eight named plaintiff have joined one or more of the defendant Unions and do not now represent the non-union employees.*

(3) The Railroad further says on information and belief that approximately 2500 of its employees in said crafts and classes involved in this litigation do not belong to any of said labor organizations, *and that each of said 2500 employees have rights adjudged to them by said judgment, decree and injunction in accordance with the judgments of this Court and the opinion of the United States Court of Appeals for the Sixth Circuit in the case of System Federation No. 91 v. Reed, 180 F. 2d 991, decided March 13, 1950.*

(4) In addition to the named plaintiffs and those who have intervened in the action for the purpose of holding the Railroad and defendant Unions in contempt, namely *C. P. Reed* and *J. P. Crain*, the Railroad has been faced with many claims from other employees of the classes and crafts involved that the injunction has been violated to their detriment and damage by the Railroad and the de-[fol. 58] fendant Unions. From time to time these claims have been adjusted by the Railroad without the necessity of Court action. These parties are interested parties whose rights have been adjudicated in and protected by this decree, and *whose rights concerning their jobs and employ-*

*ments will be affected to their detriment by the motions here made to modify this decree. The individual members of the classes and crafts involved herein have the protection of this judgment and should be notified by notice before any action is taken adversely affecting their rights under the judgment in order that they may intervene in this action if they so desire for their own protection.*

II. Comes the Louisville & Nashville Railroad Company and moves the Court for time to file its response to the motion to modify the judgment at a date after the defendant Unions have given the necessary notice to the individual members of the classes and crafts involved in the manner required by this Court.

John P. Sandidge, Woodward, Hobson & Fulton, 1805 Kentucky Home Life Bldg., Louisville 2, Kentucky, JUniper 5-3321, Attorney for Defendant, Louisville & Nashville Railroad Company.

H. G. Breetz, 908 West Broadway, Louisville, Kentucky, JUniper 5-1121, Attorney for Defendant, Louisville & Nashville Railroad Company.

[fol. 60]

IN UNITED STATES DISTRICT COURT

ORDER RE MOTION TO MODIFY INJUNCTION—July 16, 1957

On this the 16th day of July, 1957, this case came on for a hearing on defendant's motion to modify the injunction entered in this case on December 7, 1945. There appeared Marshall P. Eldred, attorney of record for the plaintiffs who appeared specially pro se; John P. Sandidge and H. G. Breetz for the defendant, L & N Railroad Company; and Richard R. Lyman, Robert E. Hogan, and Lester P. Shoene for the moving parties defendant in this motion.

After hearing arguments of counsel, and the Court being sufficiently advised, It Is Ordered that in addition to the service of notice of the hearing of this motion on Marshall P. Eldred, originally appearing as counsel for plaintiffs in this action, service of notice should be made on all persons whose rights may be affected by any modification of the

judgment, decree, and injunction previously entered in this action; and the Court, in the exercise of its discretion, hereby continues this case on said motion to modify the injunction previously entered in this action to the 19th day of September, 1957, at 9:30 A. M., Central Daylight Saving Time, or such other date as the Court may hereafter fix, at which time hearing on said motion to modify said injunction is to be held; Provided, however, that all persons whose rights may be affected thereby shall have been given notice of the hearing by mail at least twenty (20) days prior to the date set for said hearing.

Roy M. Shelbourne, Judge, United States District Court.

July 16, 1957

[fol. 61]

IN UNITED STATES DISTRICT COURT

RESPONSE OF CERTAIN PLAINTIFFS TO MOTION TO MODIFY—  
Filed December 21, 1957

Walter E. Lee, Marion A. Holman, E. D. Walters, Sherman Napier and V. L. Crutcher state that they are five of the original plaintiffs who filed the above styled action and for whom, and for the classes represented by them, the Judgment, Decree and Injunction of the Court was entered in the above matter on December 7, 1945. For their response, and that of the classes represented by them, to the motion of certain union defendants heretofore filed in the above case seeking to modify the injunction granted by this Court on the date aforesaid, they state as follows:

(1) The moving defendant unions have not been duly designated or authorized to represent these plaintiffs (nor any of the classes which they represent in this action, to-wit: all nonunion employees of the defendant, Louisville & Nashville Railroad Company, employed in the machinists, carmen, sheet metal workers, electricians, boilermakers and firemen, oilers, helpers and laborers crafts or classes) with respect to negotiating with the defendant railroad for a union shop agreement; nor do said unions have any authority on behalf of any employee of defendant railroad

to negotiate for or demand a union shop for the Louisville & Nashville Railroad. At the time said unions were designated by the employees of the defendant railroad as their bargaining representatives under the provisions of the Railway Labor Act, no union shop was authorized or permitted by said act, and therefore said employees of defendant railroad knew that their bargaining representatives had no authority to negotiate for or demand a union shop upon said railroad, nor did said employees contemplate or be expected to foresee that said bargaining representatives [fol. 62] would in the future have such authority, and therefore said employees did not authorize their bargaining representatives to negotiate for or demand a union shop upon said railroad within the meaning of the provisions of section 2 Eleventh of the Railway Labor Act. Inasmuch as said moving defendant unions have not been authorized by the employees of the defendant railroad to negotiate for or demand a union shop upon said railroad, they have no authority to move this Court for a modification of the Judgment, Decree and Injunction entered in this action on December 7, 1945, for the avowed purpose of permitting them to negotiate for and demand a union shop:

*Railway Labor Act*, 45 U.S.C.A., Sections 151, et seq.  
*Graham et al. v. Southern Railway Co.*, 74 Fed. Supp. 663.

(2) In the complaint originally filed in the above styled action there were 28 plaintiffs, all of whom were nonunion employees of the defendant railroad. For the acts of discrimination alleged by said plaintiffs to have been practiced against them by the defendants in said action, said plaintiffs sought against the defendants recovery of monetary damages in the amount of \$5,000 each or a total of \$140,000. The decree entered in this case on December 7, 1945, was a consent decree, agreed to by all the parties to this action. In agreeing to said decree the plaintiffs gave up their right to assert and prove damages claimed in the amount of \$140,000 in a compromise settlement in which all of said plaintiffs were paid a total of \$5,000, one-half by the defendant railroad and one-half by the defendant unions, in consideration of the declaration of [fol. 63] rights set out in said decree and the permanent injunction granted by said decree. In other words, the



agreement provided for a declaration of rights and a permanent injunction, in return for which the plaintiffs signed a waiver and release of all claims for damages against the defendants for the alleged wrongful acts done prior to the date of the release. In agreeing to the consent decree the plaintiffs gave up rights which they had and changed their position in the lawsuit then pending. The defendants benefited from the consent decree by having a claim for \$140,000 settled for \$5,000. It is now impossible to restore the parties to the position they occupied prior to the entry of the consent decree and prior to the execution of the release by the plaintiffs. It would therefore be inequitable to modify in any degree or in any respect the injunction which is part of the consent decree for the reason that the plaintiffs cannot be restored the rights which they then gave up in consideration of the consent decree.

*United States v. Swift & Co.*, 286 U.S. 106, 76 Law Ed. 999.

*United States v. Radio Corporation of America*, 46 Fed. Supp. 654.

(3) Since the entry of the consent decree referred to above there has not been a change in the factual situation surrounding the parties and the employment of plaintiffs and the classes represented by them to warrant or justify a modification of the injunction which is part of the consent decree. The only change in the situation from that existing at the time of the entry of the consent decree is a change of law, to-wit: the amendment to the Railway Labor Act now known as section 2 Eleventh. Such change [fol. 64] in the Railway Labor Act is neither directory nor mandatory, but permissive only, and does not form the basis for a modification of the injunction which constitutes part of the consent decree. A unilateral desire on the part of unions to have a union shop upon the Louisville & Nashville Railroad is not sufficient grounds for modification of the consent decree.

*United States v. Swift & Co.*, 286 U.S. 106, 76 Law Ed. 999.

*Ford Motor Co. v. United States of America*, 335 U.S. 303, 93 Law Ed. 24 (1948).

(4) The consent decree entered in this case has not been turned into an instrument of wrong or oppression and therefore is not subject to modification.

*United States v. Swift & Co.*, 286 U.S. 106, 76 Law Ed. 999.

(5) A modification of the consent decree entered in this case would make it possible for the union defendants, through economic pressure of strikes, to compel the institution of a union shop upon the Louisville & Nashville Railroad and would thus compel all employees of said railroad to join and retain their membership in a labor union in order to obtain and maintain rights and benefits of employment upon said railroad; would thus set at naught the purpose for which this action was filed and the protection secured to the nonunion employees of said railroad through the entry of the consent decree. Furthermore, the effect would be a reversal of the judgment heretofore entered in this case by the agreement of parties, and the subsequent negotiations between the defendant unions and the defendant railroad on the issue of a union shop would be tantamount to a retrial of the original issues in this case.

(6) The nonunion employees of the defendant railroad, numbering several thousands, are opposed to the modification to any extent of the Judgment, Decree and Injunction entered in this case on December 7, 1945.

Wherefore, said plaintiffs pray that the motion of the defendant unions to modify the Judgment, Decree and Injunction be denied.

Marshall P. Eldred, 420 S. Fifth St., Louisville 2, Ky., Attorney for Plaintiffs, Walter E. Lee, Marion A. Holman, E. D. Walters, Sherman Napier and V. L. Crutcher.

Of Counsel: Brown, Eldred and Tachau.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 66]

## IN UNITED STATES DISTRICT COURT

RESPONSE OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY  
 TO THE MOTION OF CERTAIN DEFENDANTS TO MODIFY THE  
 INJUNCTION—Filed December 27, 1957

Comes the Louisville & Nashville Railroad Company and for its response to the motion of certain Union defendants heretofore filed in the above case, seeking to modify the injunction granted by this Court on December 7, 1945, states as follows:

1. The defendant, Louisville & Nashville Railroad Company, objects to the motion to modify the injunction on the ground that the motion to modify has not been served on all of the actual parties to this action as required by Rule 5, Federal Rules of Civil Procedure. The Record does not reflect that any notice of this motion or the motion has been served on the following original parties to the action:

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Successor Organization to the original defendant, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America)

[fol. 67] Railroad Lodge No. 205 (Louisville, Ky.)

International Association of Machinists

C. A. Babb, President

C. M. Tydings, Secretary

K. Heidel, Treasurer

O. C. Lee, Committee Chairman

H. E. McIntyre, Committeeman

Rufus Goodman, Committeeman

Frank Berger, Committeeman

Local No. 1073 (Corbin, Ky.)

International Association of Machinists,

M. F. Hodge, President

W. M. Sharpe, Vice President

N. C. Jenkins, Secretary

Loyd F. Johnson, Treasurer

**T. R. Trosper, Committee Chairman**

**Lesley Gooden, Committeeman**

**Rein Teague, Committeeman**

**Subordinate Lodge No. 102 (Louisville, Ky.)**

**International Brotherhood of Boilermakers,**

**Iron Ship Builders and Helpers of America,**

**W. W. Adams, President**

**James C. Lovelace, Vice President**

**Russell L. Preston, Secretary**

**J. C. Brock, Treasurer**

**R. B. McMasters, Committee Chairman**

**J. C. Brock, Committeeman**

**H. A. Stromier, Committeeman**

**B. C. Elder, Committeeman**

**J. D. Hall, Committeeman**

**J. M. Wernmuth, Committeeman**

**[fol. 68] Pan American No. 576 (Louisville, Ky.)**

**Brotherhood Railway Carmen of America**

**E. C. Sattich, President**

**John J. Sillinger, Secretary**

**Herman H. Fox, Treasurer**

**W. O. Poteet, Committee Chairman**

**Daniel DeWeese, Committeeman**

**W. A. Wilson, Committeeman**

**Ray Hall, Committeeman**

**New Bridge Lodge No. 284 (Ravenna, Ky.)**

**Brotherhood Railway Carmen of America,**

**H. P. Scrivner, President**

**Pearl Miller, Vice President**

**Floyd Neikirk, Secretary**

**Stone Glass, Treasurer**

**Thomas Blackwell, Committee Chairman**

**Pearl Miller, Committeeman**

**Ollie Richardson, Committeeman**

**Local No. 445 (Ravenna, Ky.)**

**Sheetmetal Workers International Association**

**William T. Sils, President**

**Claude McKinnis, Vice President**

William A. Schujahn, Secretary  
 M. Fred Canada, Treasurer  
 W. R. Denny, Committeeman

Local No. 1004 (Louisville, Ky.)  
 International Brotherhood of Firemen, Oilers,  
 Helpers, Roundhouse and Railway Shop Laborers  
 Turner Dever, President  
 John W. Detig, Secretary, Treasurer  
 G. F. Hutchinson, Committee Chairman

[fol. 69] Local No. 362 (Corbin, Ky.)  
 International Brotherhood of Firemen, Oilers,  
 Helpers, Roundhouse and Railway Shop Laborers  
 Edgar Hamblin, President  
 Ed. Noe, Vice President  
 Garfield Carroll, Financial Secretary  
 W. C. Stephens, Recording Secretary  
 A. M. Jones, Treasurer  
 W. M. Harman, Committee Chairman  
 H. L. Disney, Committeeman  
 George Broughton, Committeeman

Local Union No. 1353 (Louisville, Ky.)  
 International Brotherhood of Electrical Workers  
 T. H. Patterson, President  
 H. B. Cherry, Vice President  
 F. C. Doutrick, Treasurer  
 J. F. Schietinger, Recording Secretary  
 C. H. Fortenberry, Committee Chairman  
 Richard McDaniel, Committeeman

The defendants enumerated are concerned with the injunction and its terms, and the Record does not reflect that they are represented in any way by any of the attorneys in this action to modify the injunction.

2. The moving defendant Unions have not been duly designated or authorized to represent the Union or non-Union employees of the Louisville & Nashville Railroad Company employed as machinists, carmen, sheet metal workers, electricians, boilermakers, firemen, oilers, helpers and labor crafts or classes with respect to negotiating with

the Railroad for a Union Shop Contract. The moving defendant Unions do not have any authority on behalf of any employee of the Louisville & Nashville Railroad Company [fol. 70] to negotiate for or demand a Union Shop for the Louisville & Nashville Railroad Company's operations. The moving Unions were designated by the employees of the Louisville & Nashville Railroad Company as their bargaining representatives under the provisions of the Railway Labor Act while said Act explicitly provides that no Union Shop was authorized or permitted by said Act. At the time of the designation of the Unions the employees of the Railroad knew that their bargaining representative had no authority to negotiate for or demand a Union Shop because said Union Shop was in violation of the Act, nor did said employees contemplate or foresee that said bargaining representative would in the future have such authority. Thus, said employees have not authorized their bargaining representatives to negotiate for or demand a Union Shop upon said Railroad within the meaning of the provisions of Section 2, Eleventh, of the Railway Labor Act (45 U.S.C.A. 152 (Eleventh)). Since the moving Unions have not been authorized by the employees of the Louisville & Nashville Railroad Company to negotiate for or demand a Union Shop upon said Railroad, said Unions are without authority to move this Court for a modification of the judgment, injunction and decree entered in this action on December 7, 1945, for the avowed purpose of permitting them to negotiate for and demand a Union Shop.

3. The Louisville & Nashville Railroad Company objects to the motion to modify because it is contrary to the provisions of each individual's contract of employment between the Railroad and its employees in the classes and crafts involved. Section 2, Eighth (45 U.S.C.A. 152 (Eighth)) provides that notices shall be posted by the carrier setting forth the third, fourth and fifth paragraphs of Section 2 (45 U.S.C.A. 152 (Third, Fourth and Fifth)). [fol. 71] The provisions of these paragraphs are required by Section Eighth to be "made a part of the contract of employment between the carrier and each employee, and shall



be held binding upon the parties, regardless of any other express or implied agreements between them." Section 2, Third (45 U.S.C.A. 152 (Third)) provides as follows:

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

The modification of this injunction in accordance with the motion of the moving Unions will require the Railroad to interfere with, influence and coerce employees in the choice of their representative in violation of the provisions of their individual contracts with the employees and in violation of the provisions of Section 2, Third (45 U.S.C.A. 152 (Third)) of the Railway Labor Act.

4. The Louisville & Nashville Railroad Company does not agree to the modification of the injunction as proposed by the moving Unions because there is no change in the factual situation surrounding the parties and the employment of the plaintiffs and the classes represented by them. The factual situation requires the continuance of the injunction because efforts are constantly made by [fol. 72] the moving Unions to require the Railroad to discriminate against the non-Union employees. The only change in the situation from that existing at the time of the entry of the consent decree is the change of law as stated in the amendment to the Railway Labor Act in Section 2, Eleventh (45 U.S.C.A. 152 (Eleventh)). The change as to a Union Shop is permissive only, is neither directory nor mandatory, nor does it form a belief for a modification of the injunction which constitutes part of the consent decree.

5. Modification of a consent decree in view of the existing factual circumstances would thwart the purpose for which the injunction was originally granted. If the injunction is modified, the moving Unions will attempt to compel, contrary to the wishes or desires of the employees, the Louisville and Nashville Railroad Company to agree to a Union Shop by the use of economic force, and, thus, would compel all employees of the Railroad to join and retain their membership in the moving labor unions in order to obtain and maintain rights and benefits of employment which are now protected by the injunction. The modification requested is in effect a reversal of the judgment heretofore entered, protecting said non-Union employees.

6. The Railroad is informed upon information and belief that large numbers of its employees are opposed to the modification of the judgment, decree and injunction entered in this case on December 7, 1945.

Wherefore, the defendant Louisville & Nashville Railroad Company, prays that the motion of the defendant Unions to modify the judgment, decree and injunction be denied.

Woodward, Hobson & Fulton, 1805 Kentucky Home Life Bldg., Louisville 2, Kentucky.

[fol. 74]

IN UNITED STATES DISTRICT COURT

AMENDED RESPONSE OF CERTAIN PLAINTIFFS  
TO MOTION TO MODIFY—Filed January 20, 1958

1. C. P. Jacobs and J. W. Watkins state that they are two of the original plaintiffs named in the complaint heretofore filed in this case. They object to any modification of the injunction heretofore issued in this case on December 7th, 1945. For their response to the motion of the Union defendants to modify the injunction they adopt by reference the response heretofore filed herein by certain plaintiffs.

2. With leave of Court heretofore granted, the plaintiffs, Walter E. Lee, Marion A. Holman, E. D. Walters, Sherman Napier, V. L. Crutcher, C. P. Jacobs and J. W. Watkins, amend their response heretofore filed to the motion of the Union defendants to modify the injunction heretofore issued in this case.

(a) They state that there exists upon the Louisville & Nashville Railroad hostility, bitterness and a feeling of resentment on the part of the employees of said Railroad who are members of the defendant Unions toward the employees of said Railroad who do not belong to any of said defendant Unions. This attitude on the part of the Union employees toward the non-union employees of the Railroad has been greatly enhanced as a result of the 1955 strike which occurred upon the Railroad for fifty-eight days in the spring of 1955.

(b) A great many of the employees of the Railroad employed in the shop crafts worked during the 1955 strike, both Union and non-union employees. Those who belonged to the Union and who worked during said strike were either expelled from the Union or voluntarily ceased to pay dues therein. Following the termination of the strike the Union employees of the Railroad displayed a hostile attitude toward the employees who had worked during the strike and subjected said employees to all manner of indignities in an effort to force said employees to give up their employment. This feeling of hostility and antipathy [fol. 76] on the part of the Union employees toward the employees who worked during the 1955 strike has been continued to this day. Should this Court modify the injunction in this case in order to permit the negotiation for a union shop upon the Railroad, the defendant Unions will force the Railroad by means of a strike, for which a strike ballot has already been taken, to adopt a union shop. All the non-union employees of the Railroad in the shop crafts (including the union members who worked during the 1955 strike and who subsequently were expelled from the Union by reason thereof) will be compelled to join the shop craft unions.

(c) The hostility and antipathy between the Union defendants and the employees who worked during the 1955 strike is so great that it can be reasonably anticipated that after the adoption of a union shop agreement upon the Railroad, the employees who worked during the 1955 strike will have to join the Union and thereafter the hostility and antipathy will be continued against them, and said employees will be discriminated against with respect to employment benefits and rights, contrary to the judgment of the Court heretofore entered in this case and contrary to the agreement of the parties in consenting to the entry of such judgment.

(d) Such discrimination and hostility which will be practiced by the defendant Unions against employees who worked during the 1955 strike (and who are compelled to come into the Union to hold their jobs after the adoption of a union shop agreement) will not be based upon the non-union status of such employees, and, therefore, will not be in violation of the judgment and injunction heretofore issued in this case, and such employees will not be subject to the protection of the injunction issued in this [fol. 77] case. Nevertheless such employees can and will be discriminated against by reason of the hostility and antipathy existing against them on the part of the defendant Unions and which will continue to exist against them. The adoption of a union shop will be a device by which to set at naught the benefits obtained by the non-union employees in this case and the protection heretofore granted them by the entry of the judgment and the issuance of the injunction in this case. The Amendment of the Railway Labor Act does not require the adoption of a union shop nor does it require this Court to modify its injunction issued upon the agreement of the parties to this case. In order to continue the protection afforded to the plaintiffs and the classes represented by them the Court should deny any modification of said injunction.

(e) Any modification of the injunction to permit the adoption of a union shop would, therefore, be inequitable and oppressive to the plaintiffs and the classes represented by them.

3. Plaintiffs named above file this response not only in behalf of themselves but in behalf of all the classes represented by them, to-wit: the non-union employees of the Louisville & Nashville Railroad employed in the shop crafts.

Wherefore said plaintiffs pray that the motion of the defendant Unions to modify the judgment, decree and injunction be denied.

Marshall P. Eldred, 420 South Fifth Street, Louisville 2, Kentucky, Attorney for Plaintiffs.

Of Counsel: Brown, Eldred and Tachau

[fol. 78] CERTIFICATE OF SERVICE (omitted in printing).

#### IN UNITED STATES DISTRICT COURT

MOTION OF N. L. PADGETT, ET AL. TO INTERVENE—  
Filed January 20, 1958

1. Come N. L. Padgett, Simon Durant, H. E. Hatfield, J. W. Ritter, H. Johnson, L. A. Hutton, Hobert Poynter, and S. S. Vanderpool and move the Court pursuant to Rule 24 (b) of the Federal Rules of Civil Procedure to permit them to intervene in this action for the purpose of responding and objecting to the motion of the defendant Unions to modify the injunction heretofore issued in this case.

2. For grounds for their motion said movants state

(a) The above styled action is a class action in which the named plaintiffs sued for themselves and in behalf of all non-union employees employed by the Louisville & Nashville Railroad Company in the shop crafts. Movants are employees of said Railroad employed in the shop crafts and are not members of the defendant Unions.

[fol. 79] (b) The defense of movants to the motion of the defendant Unions to modify the injunction issued in this case, and the defense of the plaintiffs to such a motion of the defendant Unions, have questions of law and fact in common.

3. Movants attach hereto their intervening response to the motion of the defendant Unions to modify the injunction heretofore issued in this case.

Wherefore movants pray the Court for permission to file herein their intervening response to the motion of defendant Unions for a modification of the injunction heretofore issued herein.

Marshall P. Eldred, 420 South Fifth Street, Louisville 2, Kentucky, Attorney for Movants.

Of Counsel: Brown, Eldred and Tachau

#### NOTICE

TO: Robert E. Hogan, Kentucky Home Life Building,  
Louisville 2, Kentucky  
Richard R. Lyman, 741 National Bank Building,  
Toledo 4, Ohio, Attorneys for Defendant Unions  
John P. Sandidge, Kentucky Home Life Building,  
Louisville 2, Kentucky, Attorney for Defendants  
Louisville & Nashville Railroad Company

Please take notice that the undersigned attorney will on Monday, February 3d, 1958, at 9:30 A. M., in the Court Room of Judge Roy M. Shelbourne, United States District Court for the Western District of Kentucky, bring the foregoing motion on for hearing and disposition.

This January 17th, 1958.

Marshall P. Eldred, Attorney for Movants.

CERTIFICATE OF SERVICE (omitted in printing).



## IN UNITED STATES DISTRICT COURT

INTERVENING RESPONSE OF N. L. PADGETT, ET AL.—

Filed January 20, 1958

By leave of Court N. L. Padgett, Simon Durant, H. E. Hatfield, J. W. Ritter, H. Johnson, L. A. Hutton, Hobert Poynter, and S. S. Vanderpool file herein their intervening response to the motion of the defendant Unions to modify the injunction heretofore issued herein.

1. N. L. Padgett is a carman employed in defendant Railroad's shops at Boyles, Alabama. Simon Durant is a boilermaker's helper employed in defendant Railroad's shops at Boyles, Alabama. H. E. Hatfield is a machinist [fol. 81] employed in defendant Railroad's shops in Louisville, Kentucky. J. W. Ritter is an electrician employed in defendant Railroad's shops in Louisville, Kentucky. H. Johnson is an electrician employed in defendant Railroad's shops in Louisville, Kentucky. L. A. Hutton is an electrician employed in defendant Railroad's shops in Radnar, Tennessee, Hobert Poynter is a carman employed in defendant Railroad's shops in Corbin, Kentucky. S. S. Vanderpool is a carman employed in defendant Railroad's shops in Corbin, Kentucky.

2. Each of said intervenors is employed by the defendant, Louisville & Nashville Railroad Company, is a member of the shop crafts, and is not a member of the defendant Unions.

3. Intervenors are members of a class which is so numerous as to make it impracticable to bring them all before the Court. Intervenors will fairly insure the adequate representation of said class. The character of the right sought to be enforced against the class is both joint and several and there are common questions of law and fact affecting the several rights and a common defense is made by all to the rights asserted against the class.

4. Intervenors file their response to the motion of the defendant Unions to modify the injunction heretofore

issued herein on behalf of themselves and all of the class represented by them including but not limited to the employees of the defendant Railroad listed on Schedule A hereto attached.

5. For their response, and that of the class represented by them, to the motion of the defendant Unions to modify the injunction heretofore issued herein, intervenors adopt [fol. 82] by reference the response and the amended response heretofore filed herein by certain plaintiffs as though fully set out herein.

Wherefore intervenors pray that the motion of the defendant Unions to modify the judgment, decree and injunction be denied.

Marshall P. Eldred, 420 South Fifth Street, Louisville 2, Kentucky, Attorney for Intervenors.

Of Counsel: Brown, Eldred and Tachau

## SCHEDULE A

### SOUTH LOUISVILLE SHOPS

<i>Name of Employee</i>	<i>Place Employed</i>
C. Rogers	South Louisville Shops
B. Noffsinger	South Louisville Shops
A. W. Kaelin	South Louisville Shops
D. H. DeWeese	South Louisville Shops
W. H. Sims	South Louisville Shops
A. R. Hicks	South Louisville Shops
L. R. Doplin	South Louisville Shops
Abe S. Bryant, Jr.	South Louisville Shops
John E. Beck	South Louisville Shops
Fred Obermiller	South Louisville Shops
A. H. Stromire	South Louisville Shops
John Heaton	South Louisville Shops
C. R. Hart	South Louisville Shops
J. E. Churchman	South Louisville Shops

*Name of Employee**Place Employed*

F. B. Denning	South Louisville Shops
W. L. Thomas	South Louisville Shops
[fol. 83]	
J. R. Ping	South Louisville Shops
J. W. Slaughter	South Louisville Shops
F. B. DeWitt	South Louisville Shops
J. E. Hardin	South Louisville Shops
Troy H. Brown	South Louisville Shops
J. C. Young	South Louisville Shops
W. A. Kotheimer	South Louisville Shops
A. H. Sturman	South Louisville Shops
J. M. Bean	South Louisville Shops
C. L. Black	South Louisville Shops
G. L. Hagan	South Louisville Shops
R. L. Coleman	South Louisville Shops
Wm. C. Hasher	South Louisville Shops
E. L. Rowen	South Louisville Shops
Joseph Mayer	South Louisville Shops
Ray Sampson	South Louisville Shops
L. A. Oeswein	South Louisville Shops
W. J. Blakely	South Louisville Shops
W. D. Hasty	South Louisville Shops
Theophilus Helton	South Louisville Shops
Howard Montgomery	South Louisville Shops
Damon Hart	South Louisville Shops
E. Parker	South Louisville Shops
L. T. Crigler	South Louisville Shops
J. R. Parkerson	South Louisville Shops
Virgil Rigsby	South Louisville Shops
Wiley F. Baker	South Louisville Shops
C. J. Wilcox	South Louisville Shops
W. L. Williams	South Louisville Shops
A. Finnell	South Louisville Shops
P. E. Lowry	South Louisville Shops
C. J. Gaines	South Louisville Shops
J. Hayes	South Louisville Shops
[fol. 84]	
F. Madry	South Louisville Shops
M. Y. Martin	South Louisville Shops
G. Goetzinger	South Louisville Shops

*Name of Employee**Place Employed*

L. B. Pottinger	South Louisville Shops
E. L. Bewley	South Louisville Shops
F. L. Kleier	South Louisville Shops
J. O. Shaw	South Louisville Shops
H. Webb	South Louisville Shops
J. F. Harbison	South Louisville Shops
William E. Lee	South Louisville Shops
Robert P. Willis	South Louisville Shops
J. H. Schindler	South Louisville Shops
Bert Longest	South Louisville Shops
R. W. Taylor	South Louisville Shops
E. M. Mason	South Louisville Shops
R. L. Cundiff	South Louisville Shops
Luke Sharp	South Louisville Shops
Garnet S. Hoffman	South Louisville Shops
Geo. H. C. Lynn	South Louisville Shops
A. Amloch	South Louisville Shops
W. M. Roger	South Louisville Shops
L. N. Burns	South Louisville Shops
Fred Wildt	South Louisville Shops
E. Gralls	South Louisville Shops
C. E. Bennett	South Louisville Shops
F. Edinger	South Louisville Shops
J. T. McCormack	South Louisville Shops
J. N. Fenell	South Louisville Shops
C. W. Hauselmann	South Louisville Shops
H. Leonard	South Louisville Shops
E. E. Beery	South Louisville Shops
C. A. Robertson	South Louisville Shops
B. Devine	South Louisville Shops
W. G. Moore	South Louisville Shops
[fol. 85]	
L. H. Crutcher	South Louisville Shops
A. C. Hargrave	South Louisville Shops
R. L. Free	South Louisville Shops
J. T. Buckinham	South Louisville Shops
S. Ellis	South Louisville Shops
T. A. Taylor	South Louisville Shops
W. Hester	South Louisville Shops
H. W. Schlatter	South Louisville Shops

*Name of Employee**Place Employed*

R. L. Moore	South Louisville Shops
W. W. Walker	South Louisville Shops
G. Werker	South Louisville Shops
A. L. Bishop	South Louisville Shops
C. Huff	South Louisville Shops
Louis Hess	South Louisville Shops
M. T. Sullivan	South Louisville Shops
G. P. Martin	South Louisville Shops
Guy Mitchum	South Louisville Shops
A. Engleman	South Louisville Shops
H. C. McCubbins	South Louisville Shops
O. A. Lucas	South Louisville Shops
J. E. Carpenter	South Louisville Shops
Virgil L. Emmett	South Louisville Shops
F. R. Bowles	South Louisville Shops
Henry Nichter	South Louisville Shops
I. J. Shipley	South Louisville Shops
H. A. Troxell	South Louisville Shops
H. Lurie	South Louisville Shops
C. D. Shain	South Louisville Shops
M. A. Martin	South Louisville Shops
J. L. White	South Louisville Shops
G. W. Ritman	South Louisville Shops
H. H. England	South Louisville Shops
W. C. Smith	South Louisville Shops
R. B. Puckett.	South Louisville Shops
[fol. 86]	
J. R. Perry	South Louisville Shops
R. H. Parrott	South Louisville Shops
L. E. Sanders	South Louisville Shops
J. M. Chapin	South Louisville Shops
E. N. Elkins	South Louisville Shops
A. H. Patterson	South Louisville Shops
E. H. Carrier	South Louisville Shops
W. K. Fries	South Louisville Shops

*Name of Employee**Place Employed*

H. D. Steele	South Louisville Shops
C. R. Mills	South Louisville Shops
Floyd Coyne	South Louisville Shops
R. L. Shelton	South Louisville Shops
C. H. Raley	South Louisville Shops
C. R. Main	South Louisville Shops
R. I. Castero	South Louisville Shops
C. O. Evans	South Louisville Shops
O. R. Oakes	South Louisville Shops
W. G. Gilpin	South Louisville Shops
Roy B. Doyle	South Louisville Shops
L. H. Ballinger	South Louisville Shops
H. C. Vittitow	South Louisville Shops
R. J. Arnold	South Louisville Shops
A. E. Whitesides	South Louisville Shops
O. B. Merideth	South Louisville Shops
R. O. Williams	South Louisville Shops
W. O. Vititow	South Louisville Shops
W. R. Freeze	South Louisville Shops
Leon Mitchell	South Louisville Shops
C. Cheatham	South Louisville Shops
C. H. Crawley	South Louisville Shops
W. T. Spears	South Louisville Shops
D. W. Braden	South Louisville Shops
Wm. Rudert	South Louisville Shops
J. W. Morris	South Louisville Shops
[fol. 87]	
C. Craig	South Louisville Shops
B. Herntz	South Louisville Shops
T. H. Brownell	South Louisville Shops
H. O. Wise	South Louisville Shops
D. F. Duncan	South Louisville Shops
J. A. Wolz	South Louisville Shops
L. H. Denis	South Louisville Shops



<i>Name of Employee</i>	<i>Place Employed</i>
J. B. Reaves	South Louisville Shops
G. H. Green	South Louisville Shops
Teddy Smith	South Louisville Shops
N. R. McCombs	South Louisville Shops
J. A. Hoagland	South Louisville Shops
T. V. Corbett	South Louisville Shops
T. E. Speer	South Louisville Shops
Obie Stone	South Louisville Shops
M. H. Hibbs	South Louisville Shops
John A. Link	South Louisville Shops
Albert Lee	South Louisville Shops
McKinley Inman	South Louisville Shops
Robert H. Kohler	South Louisville Shops
W. J. Ingle	South Louisville Shops
L. E. Toole	South Louisville Shops
H. R. Willett	South Louisville Shops
E. E. Yates	South Louisville Shops
D. A. Lee	South Louisville Shops
Stanley Ellis	South Louisville Shops
Albert W. Washer	South Louisville Shops
Eugene R. Wegert	South Louisville Shops
H. A. Hargrave	South Louisville Shops
G. H. Farley	South Louisville Shops
A. P. Roth	South Louisville Shops
A. B. LaMasters	South Louisville Shops
O. E. Heffner	South Louisville Shops
[fol. 88]	
L. W. Steele	South Louisville Shops
L. Merrifield	South Louisville Shops

### BOYLES SHOP, BIRMINGHAM, ALA.

Press Murphree	Boyles Shop
G. A. Baker	Boyles Shop
Fred R. Findley	Boyles Shop

<i>Name of Employee</i>	<i>Place Employed</i>
Leonard F. Thomas	Boyles Shop
Renie Ryan	Boyles Shop
Lonnie Elms	Boyles Shop
Reafer Ward	Boyles Shop
Sam Jones	Boyles Shop

### CORBIN, KENTUCKY

W. W. Tompkins	Corbin, Kentucky
John H. Smith	Corbin, Kentucky
Luther Carpenter	Corbin, Kentucky
H. B. Morgan	Corbin, Kentucky
Robert Lee Chappell	Corbin, Kentucky
E. V. Chappell	Corbin, Kentucky
Roscoe H. Teague	Corbin, Kentucky

### IN UNITED STATES DISTRICT COURT

ORDER—Entered February 4, 1958

On Monday, February 3, 1958, this action came on for trial to the Court, and there appeared, Marshall P. Eldred, for certain plaintiffs; Robert E. Hogan, Richard R. Lyman and Milton Kraemer, for the defendant and Jno. P. Sandidge and H. G. Breetz for the Louisville and Nashville R. R. Co.

Mr. Eldred moved the Court to rule on his motion to intervene on the part of certain plaintiffs, filed January [fol. 89] 20, 1958, and this motion was sustained.

The case was stated for the defendant by Mr. Lyman and Mr. Kraemer, for the plaintiff by Mr. Eldred, and for the L&NRR Co. by Mr. Sandidge.

Evidence for the plaintiff was introduced and concluded.

Counsel asked for time to file briefs. Simultaneous briefs are to be filed within three weeks, counsel is allowed ten days after the service of a copy of said brief by adversary

counsel, for filing reply briefs. When said briefs are filed said action will be submitted.

Roy M. Shelbourne, Judge, U.S. District Court.

A Copy Attest:

Martin R. Glenn, Clerk, B. F. Allen, Deputy.

February 4, 1958  
Copies mailed to  
Attorneys of Record.

IN UNITED STATES DISTRICT COURT

MEMORANDUM—Dated August 7, 1958

In July, 1945, twenty-eight non-union employees of the Louisville & Nashville Railroad Company, for themselves and representing all non-union employees upon the Louisville & Nashville System, instituted an action against that railroad company and certain shop craft unions, seeking a declaration of rights and an injunction.

The plaintiffs alleged that the railroad and the unions [fol. 90] had discriminated against the class of employees represented by plaintiffs in granting promotions, overtime work, and other privileges and benefits and had, in violation of plaintiffs' seniority rights, preferred members of the unions in their employment relationship because the plaintiffs and the class represented by them had refused to join or maintain membership in the unions.

That proceeding in this Court culminated, on December 7, 1945, in the entry of a judgment "by consent and agreement of all the parties." That judgment is as follows:

"By consent and agreement of all the parties to this action, it is ordered, adjudged and decreed as follows:

"That the defendants, other than the defendant Railroad, and all of the subordinate lodges and locals

of the defendant Unions, acting as the duly designated and authorized representatives of any employes of defendant Railroad, are, in accordance with the provisions of the Railway Labor Act and in accordance with the duly adopted bargaining agreements between the defendant Railroad and defendant Unions, under the obligation and duty to represent and treat fairly and impartially, and without discrimination based on membership or non-membership in any labor organization, all members of the crafts or classes of boilermakers, machinists, carmen, sheet metal workers, electricians, power house employes and railway shop laborers, including plaintiffs to this action, without regard to whether said employes, or any of them, are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization;

[fol. 91] "That the defendant Railroad, in accordance with the provisions of the Railway Labor Act and in accordance with the duly adopted bargaining agreements between the said Railroad and the defendant Unions, is under the duty and obligation to refrain from discrimination against its employes in the crafts or classes of boilermakers, machinists, carmen, sheet-metal workers, electricians, power house employes and railway shop laborers, including the plaintiffs in this action, because of or by reason of the failure or refusal of said employes to join or retain their membership in any of the defendant labor organizations, or in any labor organization;

"That the plaintiffs in this action and all other employes of the defendant Railroad, employed in the boilermakers, machinists, carmen, sheet metal workers, electricians, power house employes and railway shop laborers crafts or classes, who are not members of the defendant labor organizations, or any subordinate lodge or local thereof, shall from and after the date hereof and in accordance with the collective bargaining agreements, be entitled, irrespective and without regard to whether said employes, or any of them,

are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization, to the rights of promotion to preferred jobs, to jobs in a higher classification paying a higher rate of pay, to proper protection of seniority, to bid on or be assigned to vacancies, to leaves of absence with proper protection of seniority and to their proper share of overtime work and compensation therefor, as provided for in such agreements now in effect or that may hereafter be in effect in accordance with the Railway Labor Act;

[fol. 92] "That all of the defendants, and all of the subordinate lodges and locals of the defendant Unions acting as the duly and authorized representatives of any employes of defendant Railroad, their officers, agents, employes and members, and the defendant Railroad, be and they are hereby enjoined from requiring that the plaintiffs and the classes represented by them in this action join or retain their membership in any of said defendant labor organizations, or any labor organization, as a condition to receiving promotion, leaves of absence, proper protection of seniority, overtime work and any other rights or benefits which may arise out of or be in accordance with the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the Railway Labor Act; and are enjoined from denying to said plaintiffs, or the classes represented by them in this action, promotion to such preferred jobs, jobs in a higher classification with a higher rate of pay, leaves of absence, proper protection of seniority, overtime work or any other right or benefit arising out of or in accordance with the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, for the sole and only reason that the plaintiffs

or classes represented by them in this action, are not members or refuse to join or to retain their membership in any of said defendant labor organizations, or any labor organization; and they are further enjoined, [fol. 93] in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of the defendant labor organizations, or any labor organization;

"The Court retains control of this action for the purpose of entering such further orders as may be deemed necessary or proper.

"That one-half the costs of this action be paid by defendant Railroad and the other half thereof be paid by the defendant Unions."

In the case of System Federation No. 91 v. Reed, 180 F. 2d 991, at page 998, the Court of Appeals for the Sixth Circuit declared this judgment should be considered as a judgment in a true class action "and res adjudicata of the rights of all of the members of the class represented by the parties plaintiff therein."

July 2, 1957, the defendant unions and their successors filed in this action their motion to modify the injunctive phase of the judgment of December 7, 1945. The amendment sought was to provide that the injunction should have no prospective application to prohibit the defendant unions and the railroad from negotiating, entering into, or applying and enforcing any agreement or [fol. 94] agreements authorized by Section 2, Eleventh, of the Railway Labor Act as amended January 10, 1951.

It was alleged in the motion that, at the time the original complaint in this case was filed and at the time the



judgment was entered, the Railway Labor Act, particularly Section 2, Fourth and Fifth thereof, made it unlawful for carriers to interfere in any way with the organization of their employees or to coerce or compel their employees to join or remain, or not to join or remain, members of any labor organization.

It was further alleged that the amendment to the Railway Labor Act of January 10, 1951, and now constituting Section 152, Eleventh, of Title 45, United States Code, permitted the making of union security agreements as limited by that amendment, and authorized carriers and bargaining representatives of railway labor to provide for a union shop; that the unions here involved were currently seeking to negotiate an agreement with the railroad requiring the employees, as a condition to their continued employment, to become and remain members of the labor organizations representing their respective crafts; but, that the defendant railroad had refused to negotiate for such an agreement for the asserted reason that it would subject itself and such labor organizations to charges of contempt for violation of the injunctive phases of the judgment entered herein December 7, 1945.

It was alleged that the 1951 amendment to the Railway Labor Act terminated the rights of the non-union employees to be free from the requirements of union security agreements, and it was further alleged that it was no longer equitable that the injunction should have prospective application by prohibiting the defendant unions and the railroad from negotiating such union shop agreements. [fol. 95] The railroad filed a motion for an extension of time in which to file its response in the present proceedings to a date after the defendant unions should have given notice to individual members of the classes and crafts involved, alleging that some 2,500 of its employees in said classes and crafts did not belong to any labor organization, all and each of whom had rights adjudged to them in the decree of December 7, 1945, which entitled them to notice of the unions' motion. Such an order was entered, requiring that all persons whose rights might be affected by a modification of the injunction should be

given notice of a hearing not less than 20 days prior to the date set for the hearing.

Five of the original plaintiffs in the complaint filed in 1945, for themselves and all non-union employees of the defendant railroad in the machinists, carmen, sheet metal workers, electricians, boilermakers and firemen, oilers, helpers, and laborers crafts, filed a response alleging:

(1) That the movant unions were without authority on behalf of the employees to negotiate for a union shop for the reason that the unions were selected as bargaining representatives for the various crafts under the provisions of the Railway Labor Act prior to January 10, 1951, the effective date of the Railway Labor Act amendment, and at a time when the Railway Labor Act did not authorize or permit the bargaining representatives of employees to negotiate for a union shop;

(2) That, in the action filed by them in 1945, monetary damages in the amount of \$5,000.00 each was sought to be recovered by the 28 plaintiffs; that in agreeing to the said decree the 28 plaintiffs surrendered their right to [fol. 96] their claims for monetary damages, except to be paid, collectively, a total of \$5,000.00; that, having surrendered that claim for damages in partial exchange for the judgment providing a declaration of rights and injunction, it would be inequitable to permit the unions to now negotiate for a union shop;

(3) That there had been no change in the factual situation surrounding the parties and the employment of the plaintiffs and the classes represented by them which would warrant or justify a modification of the injunction; that the change effected by the amendment to the Railway Labor Act was neither directory nor mandatory, but permissive only, and the Court would not be authorized to modify the injunction, absent the change in factual situation, and

(4) Finally, the decree or judgment of injunction has not been used as an instrument of wrong or oppression;

but, a modification of that decree would make it possible for the unions, through economic pressure or strike, to compel the institution of a union shop and thereby compel all of the employees of the railroad to join and retain membership in a labor union in order to obtain and maintain rights and benefits of employment on the railroad, and would thereby set for nought and nullify the judgment entered by agreement of all the parties to the prejudice of all non-union employees of the railroad.

By amendment to plaintiffs' response, it was alleged that there existed a feeling of hostility, bitterness and resentment on the part of the railroad's employees who were members of the defendant unions toward the employees who were non-members of the unions; that this hostility and bitterness had been greatly enhanced as a [fol. 97] result of a 58-day strike which occurred on the railroad in 1955. It was alleged that during said strike union and non-union employees worked, and that those who belonged to the unions and who worked during the strike were either expelled from the unions or voluntarily relinquished their membership therein; that following the termination of the strike the union employees displayed a hostile attitude toward all employees who had worked during the strike and subjected said employees to all manner of indignities in order to force them to relinquish their employment, and that this feeling of hostility continued. It was alleged that should the modification of the injunction be granted a union shop would be established and the non-union employees would be compelled to join the unions and, after they were subject to the unions' discipline, they would be further discriminated against and punished for their failure to voluntarily seek and maintain membership in the unions and for their failure to cease work during the period of the strike.

Testimony was heard by the Court on February 3 and 4, 1958, and, at the request of counsel, time was granted for the filing of briefs. Counsel for the unions, for the railroad, and for the non-union employees have filed extensive briefs showing intensive study, all of which have been most helpful to the Court.

The question for decision, as stated by counsel for the unions, is "should an injunction be modified, in its prospective application, when the law upon which it was based is subsequently changed so as to expressly authorize conduct which was previously forbidden."

Authority for modification of the judgment and injunction is referred to as Rule 60 (b) (5) of the Federal Rules of [fol. 98] Civil Procedure. The pertinent portion of which rule is,

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; . . . "

The railroad and non-union employees insist that, under the law applicable to this case, a change of law alone is not compelling and, in fact, would not authorize the modification in the absence of change in the facts or circumstances, citing *Thompson v. Maxwell*, 95 U.S. 391; *United States v. Swift & Company*, 286 U. S. 106; *Western Union v. International Brotherhood* (CA 7), 133 F. 2d 955; *Pacific Tel. & Tel. Company v. Henneford*, 199 Wash. 462, 92 P. 2d 214; *Degenhart v. Hartford*, 18 N.E. 2d 990.

The unions, conceding arguendo that a change in facts as well as law is a part of the burden of proof devolved upon them in seeking the modification, say that no more basic or compelling change in facts could exist than the change in law which completely undercuts the source of the rights protected by the injunction. They argue that when the injunction was issued railroad security agreements (union shops) were prohibited by statute and today they are expressly approved, and that the express provision of the statute that such agreements "shall be permitted" shows a change in factual relationships than which none could be more decisive.

[fol. 99] We adopt for discussion the following outline contained in the brief of counsel for the unions:

### I. Legal Basis for Modification

- (a) Continuing authority of the Court to modify prospective application of judgment.
- (b) Sufficiency of change in law to justify modification.
- (c) Authority to modify unaffected by consent nature of decree.

### II. Insubstantial Nature of Objects Raised by Other Parties.

At the inception of this case, the Court was impressed with the language of the 1951 amendment to the Railway Labor Act which provided that, despite any other provisions of the Railway Labor Act or any other statute or law of the United States or of any state; any carrier affected by the Railway Labor Act and a labor organization duly designated and authorized to represent employees in accordance with the requirements of that Act shall be permitted to make agreements requiring, as condition of continued employment, that within 60 days following the beginning of such employment, etc., all employees should become members of the labor organization representing their craft. However, from the history of the 1951 amendment, as reflected by the proceedings in Committees and as determined by the Supreme Court in the case of *Railway Employees' Dept. v. Hanson*, 351 U. S. 225, "the union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employers to enter into union shop agreements."

[fol. 100] This Court has concluded that the Railway Labor Act as amended permits the railroad and bargaining unions to effectuate by agreement a union shop. Correspondingly, the Act leaves the railroad and bargaining unions at liberty to agree that a union shop shall not prevail and that a condition of retention of employment shall not be the maintenance of union membership by an employee in the bargaining union or any union. This reasoning ap-



plied to the agreement which underlay the decree of December 7, 1945, when the Railway Labor Act forbade a union shop, forces the Court to the conclusion that the unions were not compelled to agree that membership in a union would not be required of the plaintiffs as a condition of employment in any bargaining agreement then in effect between the railroad and the unions, or such agreements as might thereafter be in effect between the railroad and the defendant unions in accordance with the Railway Labor Act.

A reading of the judgment will show a reference in each instance where the injunction was given, in referring to the bargaining-agreement, not only to the agreement then in effect but to such future agreements as might thereafter be effected between the railroad and the bargaining unions. There was then no provision in the Railway Labor Act prohibiting the railroad and the unions from agreeing that a union shop should not obtain. There is no prohibition now in the Railway Labor Act as amended prohibiting the railroad and the bargaining unions from agreeing that a union shop shall not prevail. Under the teaching of the Hanson case, if the union shop agreement is permissive, it is also permissive to agree that a union shop shall not prevail.

The Court agrees with counsel for the unions that there is continuing authority in the Court to modify the prospect [fol. 101] tive application of a judgment of injunction. This is the teaching of the case of the United States v. Swift & Company, 286 U. S. 106, where the Supreme Court said there was no doubt that a court of equity has power to modify an injunction in adaptation to changed conditions though the Injunction was entered by consent. The Court said, "Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need . . . The result is all one whether the decree has been entered after litigation or by consent." There remains the question: should that power be exercised in this case?

Considering counsel's second heading, the sufficiency of change in law to justify modification, it is concluded



that the reasoning of the Swift case leads to the conclusion that the change in the Railway Labor Act in 1951, deleting the prohibition against a union shop and making it permissive for the railroad and the bargaining unions to provide for a union shop, does not authorize a modification of the decree which enjoined the railroad and the unions from providing for a union shop in existing agreements or those to be thereafter made under the provisions of the Railway Labor Act. The law would have prohibited the then making of such an effective bargain had no agreement been made. In the Swift case, the Supreme Court said, "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

[fol. 102] Finally, upon counsel's proposition that the nature of objections raised by the railroad and the original plaintiffs are insubstantial, it is shown without an attempt at refutation that bitterness and hostility exist between the union and non-union employees of the railroad, and also between the unions and their members who worked during the strike of 1955. The existence or non-existence of animosity, hostility, or bitterness is not decisive of the question involved on the pending motion. Counsel for the unions insist that any threat of reprisal from that source could be avoided by suitable provision in the judgment or order of modification in addition to the safeguard provided in the 1951 amendment to the Railway Labor Act. The circumstances proven do not convince the Court that such supervision of the conduct of a union of its affairs among its own membership, as such a provision might entail, should be undertaken.

It is to be remembered that the provisions of the Railway Labor Act made illegal a union shop in 1945, when the injunction was agreed upon. Hence, it was then unnecessary for the railroad and the unions to agree, as they did, that the non-union members should not then be required to join or maintain membership in any of their craft unions as a condition precedent to employment. The law so prohibited, Section 152, Fourth and Fifth, Title 45, United States Code, Railway Labor Act. The railroad and

unions went further to provide by their agreement that no such requirement of union membership should thereafter be in effect in any bargaining agreement in accordance with the provisions of the Railway Labor Act. The 1951 amendment to the Act did no more than make negotiations for a union shop permissive, *Railway Employees' Dept. v. Hanson*, supra. The amendment did not nullify the agreement or the injunction. It did not prohibit an agree- [fol. 103] ment between the railroad and the unions that a union shop should not exist. Hence, the Court leaves the parties as they agreed to be and to remain.

The motion to modify is overruled and an order so providing will be tendered for entry by counsel for plaintiffs in accordance with Rule 7 of the local rules of this Court.

Roy M. Shelbourne, United States District Judge.

August 7, 1958

[fol. 104]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO MODIFY INJUNCTION—  
Entered August 22, 1958

The motion of the defendant unions and their successors to modify the injunctive phase of the "Judgment, Decree and Injunction" of this Court, heretofore entered in this case on December 7, 1945, having been heard and considered by the Court upon the pleadings, exhibits, evidence, written briefs and oral arguments of the parties, by counsel, and the Court being duly and sufficiently advised, it is

Ordered, Adjudged and Decreed that the motion of said defendants be, and the same is hereby overruled.

Roy M. Shelbourne, United States District Judge.

August 22nd, 1958

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

No. 13,768

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**SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES DEPART-  
MENT AFL-CIO, et al., Appellants,**

**—v.—**

**O. V. WRIGHT, et al., Appellees**

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**APPEAL FROM UNITED STATES DISTRICT COURT, WESTERN  
DISTRICT OF KENTUCKY AT LOUISVILLE.**

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**Appendix of Appellees other than Louisville and Nashville  
Railroad Company—Filed July 15, 1950**

[File endorsement omitted]

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE**

Civil No. 942

O. V. WRIGHT, et al., Plaintiffs,

—v.—

SYSTEM FEDERATION No. 91, Etc., Defendant.

**Transcript of Testimony, Motion to Modify the Injunction  
of December 7th, 1945—February 3, 1958**

Heard Before:

Honorable Roy M. Shelbourne, United States District  
Judge for the Western District of Kentucky, without a jury.

**APPEARANCES:**

Marshall P. Eldred, attorney for plaintiffs.

Richard R. Lyman, Toledo, Ohio, Milton Kramer, Wash-  
ington, D. C., and Robt. E. Hogan attorneys for defendant,  
System Federation No. 91.

John P. Sandidge and H. G. Breetz attorneys for L. & N.  
Railroad.

N. L. PADGITT was called as a witness by counsel for the  
plaintiffs, and after having been duly sworn, was examined  
and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Tell the Reporter your name and address.

A. N. L. Padgitt, Mount Pinson, Alabama, Route 1.

[fol. 2] Q. Were you employed by the Louisville and Nashville Railroad Company?

A. Yes, sir.

Mr. Lyman: Court please, at this time I would like to object to the introduction of the testimony by this witness and any others that may follow, for the reason that there is no factual issue before the Court, and therefore any testimony that may be presented will be completely irrelevant to the pending motion.

By the Court: All right, your objection is overruled, but the objection may be considered as having been made to the introduction of each witness without being repeated each time.

Mr. Lyman: Thank you, Your Honor.

Q. Where are you employed and in what capacity, Mr. Padgitt?

A. At Boyles, Alabama.

Q. Is Boyles, Alabama, the suburb of Birmingham, at which are located shops of the Louisville & Nashville Railroad?

A. Yes.

Q. And what is your job at Boyles?

A. Carman.

Q. How long have you been a carman at Boyles?

A. Since '44.

Q. Prior to that, what job did you hold with the railroad?

A. As a helper.

Q. Carman helper?

A. Yes, sir.

Q. How long did you hold that job?

A. Well, a good many years.

[fol. 3] Q. Prior to 1944?

A. Yes, sir.

Q. Do you belong to the carman's organization?

A. Now?

Q. Yes, sir.

A. No, sir.

Q. Did you belong to it at one time?

A. Yes, sir.

Q. When did you belong?

A. Sometime in '44 until '55.

Q. Why do you not now belong?

A. Well, one reason, they threw me out.

Q. And why did they throw you out?

A. Because I worked in '55 during the strike.

Q. When did the 1955 strike occur, what part of the year?

A. The 16th of March, I believe, was it the 16th?

Q. How long did it last?

A. 58 days.

Q. You say you worked during the strike?

A. Yes, sir.

Q. At Boyles?

A. Yes, sir.

Q. After the strike was over, could you have remained in the union?

A. I don't think so.

Q. I believe you said they kicked you out?

A. Yes, sir.

Q. Did they tell you why?

A. Because I worked during the strike.

Q. After the strike was over, Mr. Padgitt, would you tell the Court what, if anything, happened to you on the job which grew out of the fact that you worked during the [fol. 4] strike?

A. Well, about everything that could happen to a man, I guess.

Q. Now, just in your own way and your own words, just take your time, and tell the Court what happened, he wants to find out about this.

A. Well, the first thing happened when we came back, every day when we would go to eat lunch, the whole bunch, I will say 35 or 40, would group up around us when we were eating. Some threw firecrackers down where we were eating, and mill around us while we were eating, disturb us while we was eating, call us this and that, and booed us.

Q. What did they call you?

A. Scabs, and boo us, and go on at us and pester us. They done that several days at dinner, and then when we would have to go get material, they would chunk us on the way and back.



Q. What do you mean, chunk you?

A. Throw rocks and nuts.

Q. Now, when you say "they", who do you refer to?

A. Well, you hardly knew who done it, the men was working, but you wouldn't see them, hear the rocks when they would come close to you.

Q. Well, I understand that. You said 35 or 40 men would gather around you at once—what men were they?

A. The men that belonged to the organization that was out.

Q. You mean they were employees of the L. & N. who belonged to the union and who went out during the strike?

A. Yes, sir.

Q. What else happened?

A. Well, I told you about this chunking.

[fol. 5] Q. Yes, sir.

A. And one time I was working down on the steel gang, working on a hose, somebody throwed a three-quarter nut at me, and I had a wrench up in my hand, had it up about like this. This nut came along and hit this wrench and knocked it out of my hand, and the wrench and the nut both hit the car. If it had of hit me, if the nut had of hit me, I imagine it would have killed me. They stole all my tools, fore up my tool box, they cut up my clothes, throwed them out of the locker, poured oil on them, creosote, drove pegs in my locker, keyhole where you unlock it.

Q. How many times did they get into your locker and damage your clothes?

A. About three or four times, I don't remember just how many times.

Q. All right, Mr. Padgitt, anything else?

A. Not too long—that was right after the strike—about three or four months ago—

Q. You mean 1957?

A. Yes, sir, I was sent to the train yard in a reduction in force and some of them taken some old coil and put—

Q. Wait a minute, Mr. Padgitt, I didn't catch that, they took what?

A. Oil, you know what you oil boxes with.

Q. Oil waste?

A. No, sir, poured it on big piece of paper, just took this big piece of paper and laid it over my lunch bucket where, you know, the oil would run back in my lunch.

Q. It was the grease that you use then?

A. Yes, sir, oil.

Q. That was in the Fall of 1957?

A. Yes, sir.

[fol. 6] . Q. Anything else you want to relate?

(No answer.)

Mr. Eldred: I think you have about covered it. You may ask him.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

G. A. BAKER was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Tell the Court your name and address?

A. G. A. Baker, Center Point, Alabama.

Q. Are you employed by the Louisville & Nashville Railroad Company?

A. Yes, sir, I am.

Q. In what capacity and where?

A. As a helper in the train yard, oiling.

Q. At what place?

A. Boyles, Alabama.

Q. How long have you been employed at Boyles in that capacity?

A. Since 1940.

Q. Do you belong to the bargaining union which is the official representative of your craft?

A. No, sir, I do not.

Q. Did you belong at one time?

A. I did.

Q. When did you belong?

A. Back in '40, 1940, after I went to work for the company.

Q. When did you drop out, if you did?

[fol. 7] A. Some time in--well, let's see, I went in the service, I came back out of the service in 1945, I went back into the union, was in there best I remember something like three months, and dropped out.

Q. In what year?

A. '45.

Q. Now, later on, did you make an effort to get back into the union?

A. Yes, sir.

Q. What were you told with respect to what it would then cost you?

A. Well, I went to the local chairman and asked him what it would cost me to get back in, and he told me it would cost me \$20. He said you never did belong, did you, and I said yes, I did at one time. He said, oh, well, says it will cost you \$30.

Q. Now, Mr. Baker, did you work during the 1955 strike?

A. Yes, sir.

Q. Tell the Court in your own words what happened to you on the job after that strike was over?

A. Well, after I came back in there, the men, they would throw at me, holler scab at me. Every time my back was turned, somebody would try to knock me in the head with a rock or nuts, rivets. (Indistinguishable.)

Q. Wait a minute, don't talk so fast. You say when you went to the bull pen?

A. Yes; to get material have to use.

Q. All right, what else happened?

A. They refused to talk to you, wouldn't speak with us.

Q. What about lunch time, did you have any union employees of the railroad gang around you while you ate your lunch?

[fol. 8] A. No, sir, I never did. On the job where I was working, they never did gang around me, but they ganged me while at work one time.

Q. All right, now, did you have any trouble getting in or out of the place of work after the strike was over?

A. Well, yes, one afternoon after work, started home, got out to my truck, my tire was cut off it.

Q. Had that tire been in good condition when you drove to work that morning?

A. It had.

Q. Was it a fresh cut in it?

A. Yes, it was.

Q. Then tell what happened?

A. Well, I looked at the tire, saw it was ruined, and I decided to drive on outside the gate. So, as I started out the gate, they was lined up on both sides.

Q. Now, who was lined up?

A. The men that stayed out, the union men that stayed out during the strike.

Q. You mean railroad employees who were out during the strike?

A. Yes. They was lined up on both sides of the gate, hollering at me, looking like daring me. I pulled on outside and stopped and got out of the truck, but no one bothered me after I got out of the truck, on the outside. My wife came along in a car, I got in the car with her, we went over to the garage to get a mechanic to come back and change the tire, left the truck sitting there. When we got back the truck was turned over.

Q. When you went to get help for your truck, how many union employees of the railroad were there at the gate where your truck was?

[fol. 9] A. I couldn't truthfully say but there was—

Q. Would you say about how many, Mr. Baker?

A. At least 30 or 35 hanging around the gate and sitting in their cars on the inside.

Q. You know why your wife was there to meet you?

A. Yes, sir.

Q. If you know why she was there, tell the Court why?

A. The Sheriff down in town, she talked to him about it, about having a witness if anything should happen, and he advised her to park the car up on the side of the hill where she could oversee the shop, and if anything happened, she could be a witness to what happened.

Q. Did you have any trouble with your tools?

A. Yes, sir, my tool box was broke into, tools taken out of it, the locked throwed away.

Q. Anything else?

A. Well, some time after that I had a barn out where I am living now that burned.

Q. A barn?

A. Yes, that was burned down.

Q. You know who burned it down?

A. No, sir, I don't know who, but I do have the names of some boys that was inquiring where my barn was the day before the barn burned that night.

Q. Was it burned at night or day?

A. At night.

Mr. Eldred: You may ask him.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

[fol. 10] SIMON DURANT was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Tell the Court your name.

A. Simon Durant.

Q. Where do you live?

A. 3402 28th Avenue North, Birmingham, Alabama.

Q. By whom are you employed?

A. L. & N. Railroad.

Q. In what capacity?

A. I am a laborer now.

Q. Where?

A. Boyles.

Q. How long have you been a laborer at Boyles?

A. Ever since '50—let's see, '48, I believe. I was boiler-maker helper until 1948 and cut back to a laborer.

Q. How long were you a boilermaker's helper?

A. 31 years.

Q. From 1923?

A. Yes, sir.

Q. Do you belong to the union organization representing the boilermakers?

A. No, sir, I do not.

Q. Have you ever belonged to that organization?

A. No, sir.

Q. Did you work during the 1955 strike?

A. Yes, sir, I did.

Q. Did you have any trouble afterwards?

A. Yes, sir.

Q. Will you tell the Court about it?

[fol. 11] A. After the strike, I was ordered to go back to my inspector job that I held before the strike. I was kind of janitor and cleaned up the oil house and paint shop and around. So, I went to the paint shop first thing that morning. That's what I usually do every morning. I went in there, all the painters and everybody in there, they weren't working, they just stood around the walls I don't know what all they had, had sticks and something heavy in their hand.

Q. Now, were they employees of the railroad?

A. Yes, sir.

Q. Were they union employees?

A. Yes, sir.

Q. Were they men that went out during the '55 strike?

A. Yes, sir.

Q. All right, go ahead.

A. They didn't say anything to me, but they just stood around just like they wanted to—look like they just said if I just would, I would do something to you, but they didn't do anything to me that morning, didn't say anything to me. They were all before the strike very friendly, I thought. Of course they didn't show any sign of being friendly to me after the strike whatever. So, I done my cleaning and went out, and of course I didn't have any trouble with them, that morning.

In the afternoon I was supposed to go to the wheel shop to clean up, and when I started in the door, this lead man told me, don't come in there. And I kind of hesitated, he told me don't come in there, I couldn't work in there no more. So, my foreman was over to the next building. I went over there and told him about it, and he told me how come, did he tell you why, and I said no, he didn't tell [fol. 12] me why. So, he took me and said come on, let's go over there. We went over there and he spoke to this



fellow, I don't know what he said to him, but anyway he told me to come on in there and do my work like I had been doing.

Q. That was your foreman told you?

A. Yes, sir.

Q. Who was this other man you are talking about?

A. Mr. Jim Wade.

Q. Is he a union employee?

A. Yes, sir.

Q. A man that went out on the '55 strike?

A. Yes, sir. So, after he told me to do my work, they seemed to have been so desperate I was afraid to take a chance because it looked like all of them was just desperate against me, and I told him I appreciate what you said, but I think I should take this up with the Master Mechanic or somebody more in authority where if something would happen, they would know about it. He said yes, I guess that is the thing to do. So, I went to the Master Mechanic about it. He asked me did they give me any reason for saying not to come in there, and I told him, no, sir. He said what time do you usually go in there, and I said the afternoon. He said well, you go back in there the same time you usually go in there, and he said don't say anything to anybody, just do your work. Of course, I did.

Every time I would go in there, they would tell me I wouldn't be there long, they were going to get my job, they were going to see to me not having a job.

Q. Who was it said that?

A. Mr. Jim Wade.

Q. He was a union man?

A. Yes, sir, said he was going to see to me not having a [fol. 13] job, that I wouldn't be there but a few more months. I continued to do my work. All the time I would go in there, they would have something to say, would be saying something about he is just here for a few days, he won't be here long. I didn't pay any attention to that.

The next morning, I went to the paint shop, the first place I went, this little man, he called me in the office, he said "Simon, come in here a minute." I went in the office and he said shut the door, and he said now, understand me good, I haven't got anything against you, he said, but these

fellows say you can't work in here no more, said you worked during the strike and they wouldn't stand for me to work in there. I said, I told him then, I said, well, this is my job, and I have to do something about it, I just can't walk off my job, I have to see somebody in authority.

So, I went back to this same man, the foreman, and sent me back to the master mechanic. It happened the travelling master mechanic was there at the time and he told me that they didn't have no authority to tell me not to come in there, said they had supervisors to tell us what to do.

Q. So, you continued on your job?

A. Yes, sir, I continued on my job.

Q. Now, Simon, while you were working after the strike was over, was anything ever thrown at you?

A. Yes, sir, we were—I think they got so desperate until the Master Mechanic decided he would move me out of this place to another job. Of course, we had to go about, I would say, about two blocks or a little better than two blocks to my job every morning, and there would be about fifteen or twenty or twenty-five stationed at that place every morning, just two of us together, and they would [fol. 14] throw one inch bolts—I mean one inch nuts, and seven-eighths nuts and everything after us every morning. Finally, one morning I guess he would have hurt me but the nut hit the ground before it hit me, hit me right up on the shoulder there. I had been reporting so much that I didn't say anything about it, because it didn't hurt me too bad.

But after that, we had to almost walk with our backs turned the way we were going, you know, and looking toward them, because they would just chunk at you and then dodge, you couldn't identify anybody. They would chunk at us every morning but we kept our eyes on them and they didn't get a chance.

Q. Now, Simon, last December, that is December of 1957, was any remark made to you or in your presence about holding your job?

A. Yes, sir, up in my locker room, since this letter has been out, they would never tell you anything, but they always talking where you could hear it, as soon as this injunction is mortified, we will get all the scabs, we will get all the scabs. They said that on the 2nd of January, I

heard a gang of them saying the same thing, on the 2nd of January, said, as soon as this injunction is dissolved, we are going to get all the scabs.

Q. Simon, you mean they would make those remarks in your presence—were you able to identify whether they had worked or not worked during the strike?

A. None of them had worked.

Q. How did you determine that fact?

A. Well, I know all of them personally.

Mr. Eldred: I believe that's all.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

[fol. 15] SAM JONES was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

#### Direct examination.

By Mr. Eldred:

Q. Give the Court your name and address.

A. Sam Jones, 1411 Appalachee Street, Birmingham, Alabama.

Q. Are you employed by the L. & N. Railroad?

A. Yes, sir, I's.

Q. Where and in what sort of a job?

A. Birmingham, Alabama, carman.

Q. How long have you been a carman there?

A. '36.

Q. Prior to 1936, did you have a job with the railroad, and if so, what?

A. 1921, laborer to '22, helper from '22 to '36.

Q. So you have been continually employed by the railroad since 1921?

A. That's right.

Q. Do you belong to the union organization representing the carmen on the L. & N.?

A. No, sir.

Q. Did you ever belong to that organization?

A. No, sir.

Q. Did you work during the 1955 strike?

A. Yes, sir, I did.

Q. After that strike was over, will you tell the Court what happened?

A. It was rough going. After the strike, we come in, coming, you know, from where I live, it would be South of the shed, these men would be upstairs looking out the window. They would say there comes that scabbing so and so, we are going to kill him, and says they got nine days to work, saying if they wants to work they will pay us fifty dollar fine for working and fifteen or twenty five dollars to join.

Q. What else, Sam?

A. On the job at the pit where we worked, where we put wheels under cars, they would come around there as though I was a go-rilla or something in there working, that was during work hours.

Q. Wait a minute, I didn't understand you, do what?

A. They would yell around the pit though as if I was some varmint or something in the pit, and they would act as if it was the last person they would see. Then they would go a distance from that pit and throw stones and nuts against it, and they would point me out and say we are going to kill him. That was time and time again, and at noon-time when we would be eating lunch, there would be 75 or 80 or 100 men.

Q. Now, were they employees of the L. & N.?

A. They was employees of the L. & N.

Q. Were they employees that worked during the strike?

A. That's right, they had their "58-Day" buttons on.

Q. What do you mean by that "58 Day" buttons?

A. Well, now, I just couldn't tell you what they meant.

Q. Is that the button that the men wore that went out on the 58 day strike?

A. That's right. And then coming to and fro from home, there would be a bunch between the tractor called 3 and 4—I would come up between 2 and 1. There would be stones thrown against that, just almost like times like hail or something falling, but, you know, we would dodge and I would go report it, and we was advised not to bother them,

[fol. 17] just go on. It was miserable. Can't nobody witness what it was but the ones that were there.

Q. Sam, did you ever find anything hanging near the car shed?

A. Oh, yes, sir, had little dummies strung up on the North end of the car shed with a line running across it, little dummies hung up there by the head and just point out that is what they are going to do with the scabs.

Mr. Eldred: You may ask him.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

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N. L. PADGITT was recalled as a witness by counsel for the plaintiffs, and was further examined and testified as follows:

Redirect examination.

By Mr. Eldred:

Q. Mr. Padgitt, I will ask you if you observed whether the conduct toward you that you described was carried out against any other employees down in the Boyles Shop during this same period of time you testified about?

A. Yes, sir.

Mr. Eldred: That's all.

G. A. BAKER was recalled as a witness by counsel for the plaintiffs, and was further examined and testified as follows:

Redirect examination.

By Mr. Eldred:

Q. Was the same sort of conduct meted out to other men [fol. 18] who worked during the 1955 strike as you have described occurring to yourself?

A: Yes, it was. One occasion I particularly recall a buddy of mine went out, I went out just ahead of him one evening. He had a Chevrolet, '56 Chevrolet almost brand new. As we went out the gate, they was a couple of boys throwing rocks through the back glass and busted it all to pieces.

Q. That was the gate from the shops?

A. Yes, sir.

Mr. Eldred: That's all.

SAM JONES was recalled as a witness by counsel for the plaintiffs, and was further examined and testified as follows:

Redirect examination.

By Mr. Eldred:

Q. Did you see the same sort of treatment given to other men who worked during the 1955 strike at Boyles as you described occurring to yourself?

A. Yes, sir, I did. One I would love to say, a man by the name of Heywood Carter, he was struck and lost lots of time by his arm being nearly broken by the same things.

Q. Haywood Carter?

A. Yes, sir.

Q. He worked during the 1955 strike?

A. That's right, he is here now.

SIMON DURANT was recalled as a witness by counsel for the plaintiffs, and was further examined and testified as follows:

[fol. 19] Redirect examination.

By Mr. Eldred:

Q. Did you see other men who worked during the 1955 strike at Boyles subjected to the same sort of treatment you received and about which you described?

A. Yes, sir.

Q. After the 1955 strike was over, did any union employee approach you about paying him any money?



A. Yes, sir.

Q. What was that about?

A. They said the local chairman, I guess it was the committeeman that approached me, and said if I would pay them \$65 wouldn't anything, they would fix it so they wouldn't use no violence on me. I know of several fellows that paid that \$65. I know one boy came and told me, asked me if they had approached me. I told him yes. He said did you pay them. I said no, I didn't pay them. He said you did right, I believe they are using more violence on me since I paid it than they did before I paid the \$65.

Q. You didn't pay the amount?

A. No, sir.

Mr. Eldred: All right, stand by.

E. E. YATES was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. State your name and where you live.

A. E. E. Yates, Corydon, Indiana.

Q. Are you employed by the L. & N.?

A. Yes, sir.

[fol. 20] Q. Where?

A. Since 1923.

Q. Where do you work?

A. Freight car department.

Q. Louisville?

A. Yes, sir.

Q. In what capacity?

A. Welder.

Q. Is that in the car department?

A. Yes, sir.

Q. How long have you been in the carman's craft?

A. Since 1933.

Q. And prior to that time what was your job with the railroad?

A. Machinist and apprentice.

Q. I believe you said you started working for them in 1923?

A. Yes, sir.

Q. Do you belong to the carmen's organization?

A. No.

Q. Did you at one time belong to the organization?

A. At one time up until about 1948 or '9.

Q. Now, did you work during the 1955 strike?

A. I did.

Q. After the strike was over, what sort of treatment was accorded you on the job by any of the employees?

A. Well, what they call the silent treatment and intimidating remarks, and threatening to throw us out when they got a union shop and various other things.

Q. Were you ever surrounded by a group of men who had gone out during the 1955 strike?

A. I was a time or two, yes.

Q. Did you know they were the men who had gone out [fol. 21] during the strike?

A. I did.

Q. What did they call you, Mr. Yates?

A. Well, scabby SOB's and everything you could think of.

Q. Was anything ever said to you about what would happen after they got a union shop?

A. They would throw me over the fence, which meant they would have me fired.

Mr. Eldred: I believe that's all.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

J. B. QUIGGINS was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Will you tell the Court your name?

A. J. B. Quiggins.

Q. During the 1955 strike were you employed by the L. & N. Railroad?

A. Yes, sir.

Q. In what capacity?

A. Master Mechanic.

Q. Where?

A. Boyles, Alabama.

Q. Did you work at Boyles as Master Mechanic after that strike was over?

A. Yes, sir.

Q. Mr. Quillins, do you know what the situation was at Boyles, as between the union employees and the railroad [fol. 22] employees who had worked during the strike?

A. I was well aware of it, yes.

Q. Will you tell the Court what you observed and what came to your attention?

A. There was very little of it that I observed personally, but all of the cases of violation and so forth came to me by the men who were affected.

Q. Were they reported to you by the men?

A. Yes, sir.

Q. Were those reports many or few?

A. Many—daily.

Mr. Lyman: Your Honor, we haven't objected as we went along, but this is very obviously pure hearsay, and we object.

By the Court: Overruled.

Q. Can you tell the Court what type situation was called to your attention, what type of complaint was made or what did the complaint bear on?

A. The men who had worked during the strike complained daily because they couldn't use the wash rooms without threats and so forth. In one instance one of them was severely beaten which I didn't see, but statements were taken in the case. However, that was the end of it as far as I know. Men complained daily and made complaints and claims as to their clothes being destroyed and tools.

Q. Few or many men?

A. Many of them, many of them kept their clothes in their automobiles parked in front of the office, and wouldn't

attempt to use the wash rooms. There were many of them in the train yard after dark, those on night assignments wouldn't finish their day's work. They would claim they had things thrown at them and shot at with slingshots, and they reported those cases to me, daily.

[fol. 23] Q. Any of those missiles turned into your office?

A. Yes, I couldn't say exactly whether they came from the train yard or the car shop, but many of them were nuts with rawhide and rope strings tied on them that had been hurled.

Q. These two steel balls, do they look like any of the missiles reported to your office as being shot at the men?

A. I have seen some like that. Most were smaller, sling-shot type, others that had the rawhide and string on them were nuts from an inch to an inch and a quarter, I would say.

Q. Could you give the Court some idea about the number of men at Boyles that worked during the strike?

A. Various crafts, some two hundred.

Mr. Eldred: That's all.

Mr. Lyman: No questions.

#### Cross examination.

By Mr. Sandidge:

Q. After the strike, did you have to separate the union and non-union men?

A. I certainly did.

Q. Tell the Court about that.

A. Well, there was so much of the dissention and feeling was so high among them that we did move them and tried to keep them segregated, that is, keep the men that worked during the strike away from the men that did not work during the strike.

Q. Why was that?

A. That was expediency, in order to get the work done.

Q. Why was it necessary?

A. Well, these same men would come in and claim they were thrown at, while on the job, and we had no cooperation [fol. 24] from the other men.

Mr. Sandidge: That's all, thank you, sir.

J. C. LANEY was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

*Direct examination.*

By Mr. Eldred:

Q. Tell the Court your name and where you live?

A. J. C. Laney, I live at Birmingham, Alabama.

Q. Are you employed by the L. & N. Railroad Company?

A. Yes, sir, as locomotive engineer.

Q. Were you so employed by that company in the Spring of 1955?

A. Yes, sir.

Q. Did you work during the 1955 strike?

A. No, sir.

Q. Are you a member of the Brotherhood of Locomotive Engineers?

A. Yes, sir.

Q. Were you a member of that organization during the 1955 strike?

A. Yes, sir.

Q. At that time, did you hold any official position with that union?

A. Yes, sir.

Q. What was that?

A. I was local chairman and legislative representative.

Q. Do you hold any official position with that union today?

A. Yes, sir, I am local chairman and legislative representative.

Q. Now, did you return to work after the conclusion of [fol. 25] the 1955 strike?

A. Yes, sir.

Q. Did any of your work take place within the yards and adjacent to the Boyles shops?

A. Yes, sir.

Q. Did you observe the situation at Boyles following the conclusion of the strike with reference to how the union employees who walked out during the strike got along with the men who worked during the strike?

A. Yes, sir.

Q. Will you tell the Court what you observed?

A. Well, I don't know just where to start, there was so much that happened.

Q. Just what you can think of, Mr. Laney?

A. Well, after the strike was over and we went back to work, I was sitting on the engine one afternoon, and I saw an employee with a slingshot, crawling along, hiding down behind the shadows, stalking some of the oilers that had worked during the strike, and he attempted to slip up on them and they saw him and got away and he went on about his work. Later on, he slipped up on some and got a shot at them, and he just barely scratched one of them, didn't hurt him too bad.

Q. What was he shooting in the sling?

A. Steel balls.

Q. Steel ball anything like these two I am holding up before you?

A. Yes, sir.

Q. Go ahead, tell the Court what else you know?

A. After the strike, the things got so rough that in the train yard we would go to work in the afternoon and about dark, the oilers and inspectors would disappear and we [fol. 26] didn't know where they were going, and come to find out when it got dark these people got to shooting at them and just ran them off. I observed in one case an employee getting a thermos bottle of another employee that had worked during the strike and urinating in the bottle. I also observed taking their lunch, opening the bread up on the sandwiches and putting all kind of vile objects in it.

I observed a committee that was appointed or they operated called the flower committee. They would go around and take up collection for flowers, and the people they would get the flowers for, it was implied at that time there was nothing wrong, but they would need flowers, and they used the money or at least they told me when I was solicited for donations that they would use the money to hire somebody—some goons to do the work for them. I observed various employees get their property damaged, automobiles damaged, acid throwed on them, windshields damaged with throwing objects against them.



Q. Mr. Laney, do you think that feeling that existed between the men who worked during the strike and those that didn't, union men that walked off, do you think the feeling demonstrated by the actions you have told about has been cured or whether it still exists as of today?

A. It exists today. They are very careful because at first they were not, and after some of them were apprehended and disciplined, they become very careful about it and some of them have eliminated it, but it is a definite feeling against these people, that is very strong.

Q. Exists today. Incidentally, Mr. Laney, are you the man who exposed or helped to expose the run out of Birmingham that communist, Summers, from your union organization?

[fol. 27] A. Yes, sir.

Mr. Eldred: That's all.

#### Cross examination.

By Mr. Kramer:

Q. Mr. Laney, you have testified in another case involving the union, have you not?

A. Yes, sir.

Q. That was in Birmingham where you live?

A. Yes, sir.

Q. In that case you testified against the union on totally different grounds from what you are testifying today?

A. I am not testifying for or against the union shop.

Q. In the other case in Birmingham, didn't you testify for the people seeking to enjoin a union shop agreement?

A. I testified to the best of my knowledge the questions and facts, the questions answered it to the best of my knowledge.

Q. On whose side did you testify?

A. I testified in the Court, on the side of the Court, I hope.

Q. Did you testify on behalf of those who were seeking to enjoin a union shop agreement on the Coast Line?

A. I testified to the truth. In whose behalf it favored, that's up to other people to decide.

Q. Who asked you to testify?

Mr. Eldred: Just tell what side you appeared for.

The Witness: Mr. Price.

Q. Who is Mr. Price?

A. He was assisting with the Coast Line employees that were opposed to the union shop.

Q. What other position did he hold?

[fol. 28] A. I don't know.

Q. You are sure you don't know?

A. He is an engineer on the Atlantic Coast Line.

Q. What other position did he hold?

A. I don't know.

Q. You are sure you don't know, Mr. Laney?

A. I am sure I don't know.

Q. Mr. Laney, you are a locomotive engineer?

A. Yes, sir.

Q. That is one of the so called operating crafts?

A. Yes, sir.

Q. And you were testifying in the case in Birmingham and tried to enjoin a non-operating union shop, is that right?

A. Yes, sir.

Q. And you know that the people in this case who are trying to resist a union shop are also the so called non-operating employees?

A. Yes, sir.

Q. You, yourself, did not work during the L. & N. strike?

A. No, sir.

Mr. Kramer: I have no further questions.

Redirect examination.

By Mr. Eldred:

Q. Did these acts you described, occur with respect to shop craft employees or operating employees?

A. Shop craft employees.

Mr. Eldred: That's all.

Mr. Sandidge: No questions.

[fol. 29] HEYWOOD CARTER was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Will you tell the Court your name and address?

A. Heywood Carter, 641 E. Burnett.

Q. Are you employed by the L. & N. Railroad?

A. Yes.

Q. Were you so employed in 1955?

A. Boyles, Alabama.

Q. Boyles, Alabama, what sort of job did you hold?

A. Oiler, train yards.

Q. Do you belong to the firemen and oiler's union?

A. No, sir.

Q. Is that the union that represents your craft?

A. No, sir, that's not the union.

Q. What is the union that represents your job, if you belonged to the union, what union would you join?

A. The Brotherhood, I mean the Brotherhood.

Q. Did you say you are an oiler in the yard?

A. Yeah, oiler in the yard.

Q. You are an employee in the car department, you are what is called a carman?

A. Carman helper.

Q. Do you belong to the union now?

A. No, sir.

Q. Did you ever belong to it?

A. Used to belong to it.

Q. When did you quit belonging to it?

A. In '45.

Q. Did you work during the 1955 strike?

[fol. 30] A. Yes, I worked.

Q. Heywood, what happened to you after that strike was over, when the L. & N. came back to work?

A. Well, they threw at me every day and set a shack afire.

Q. Wait a minute, what?

A. Set one of the oiler shacks afire and burned it down. I was in the shack that evening.

Q. What else happened to you?

A. The evening, just before night, they started ganging up and started throwing at me.

Q. Who started ganging up?

A. Switchmen and car inspectors.

Q. Were they men that worked during the 1955 strike?

A. No, they didn't work.

Q. How do you know they didn't work?

A. They was out.

Q. They were out during that time. Now, would they throw things at you?

A. Threw rocks and bricks.

Q. Anything else happen to you, Heywood?

A. I was going home one evening, me and—I done went out, waiting on my nephew, and I was out at the front gate and tried to turn my car over.

Q. Who tried to turn your car over?

A. Some of the boys who was out on the strike.

Q. Some of the L. & N. employees out during the strike?

A. Yes.

Q. Anything else now you want to tell about?

A. I guess that is about all.

Q. Anybody try to collect any money from you after the strike was over?

A. No, sir.

[fol. 31] Mr. Eldred: That's all.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

JAMES E. JONES was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Will you tell the Court your name and address.

A. James E. Jones, 744 45th Place, Birmingham, Alabama.

Q. Are you employed by the Louisville & Nashville Railroad?

A. I was.

Q. During the 1955 strike, were you employed by the L. & N.?

A. Yes, sir.

Q. Where?

A. Boyles, Alabama.

Q. What kind of a job did you have?

A. Carman's helper.

Q. Did you belong to the carman's union at that time?

A. No, sir, I didn't.

Q. After the strike was over, tell about what happened to you with relationship to the employees who walked out during the strike?

A. I wasn't employed, I only went in to work after the strike, then I had to go out, but I had to work extra board, and I was called out one morning, and they told me on the phone I would have a five day assignment. When I got out there, I only worked that day, and as Carter spoke a few [fol. 32] minutes ago when they tried to turn the car over, I was in it.

Q. You were in the car with Heywood Carter?

A. Yes, sir. Two employees came out and discovered that we were out there, we were sitting in the car, waiting on another fellow, too, I was in the car. When they discovered we were sitting down there, there was a bunch of men at the gate, to get after the men that worked as they came out.

Q. Now, these men at the gate, do you know whether they worked or not during the 1955 strike?

A. They did not work, and when they found out that we were there, they came out. Well, I told him to start his motor, which he did, and before he could pull away, one snapped the door open, and I had a knife, was all I had. Well, I didn't want them to kill me, but that is what they seemed to want to do. One reached under his sweater and said I will make you eat that. By that time, Carter was about to pull off, and they tried to catch the back end of the car and turn it over, but the car was a little too heavy, I

expect, so we got away, but I reported that. Another incident, during the strike—

Q. I am not talking about during the strike now—only what occurred after the strike was over. Anything else now after the strike?

A. Well, as I aforesaid, I didn't work too much after the strike.

Mr. Eldred: That's all.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

[fol. 33] HERBERT POYNTER was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

#### Direct examination.

By Mr. Eldred:

Q. Give the Court your name and address.

A. Herbert Poynter, Keany, Kentucky.

Q. Keany, Kentucky is near Corbin?

A. Yes, sir.

Q. Are you employed by the Louisville & Nashville Railroad Company?

A. Yes, sir.

Q. In what capacity and where?

A. I am in the car department, freight car department.

Q. At Corbin?

A. Yes, sir.

Q. Do you belong to the carman's union?

A. Not at present.

Q. Did you belong to that union at one time?

A. Yes, sir.

Q. When did you belong to it and when did you cease to belong to it, and why?

A. Well, I belonged to it from the time it was organized up until September, '56.

Q. Why did you cease to belong to it in September of 1956?



A. Well, they never did nothing about—I worked during the strike, they went on and collected the dues until about eighteen months after the strike happened.

Q. Then what?

A. Then they fined us because we worked during the strike. Of course, we didn't pay our fine, they expelled us [fol. 34] from the union.

Q. Let's see if I understand, for eighteen months after the strike they permitted you to remain a member by paying your customary dues?

A. They collected their dues, yes.

Q. Then they levied the fine, and what was the amount of the fine?

A. \$290.

Q. Was that at the rate of \$5 a day for each day you worked during the strike?

A. Yes, sir.

Q. All right, did you pay the fine?

A. No, sir.

Q. And were you expelled from the union?

A. Yes, sir.

Mr. Eldred: That's all.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

SIMON VANDERPOOL was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Tell the Court your name and address, please.

A. Simon Vanderpool, Corbin.

Q. You are employed by the Louisville & Nashville Railroad?

A. Yes, sir.

Q. In what capacity?

A. Work in the car shop, carman.

Q. At Corbin?

A. At Corbin, yes, sir.

[fol. 35] Q. You belong to the carman's union?

A. Not right now, no, sir.

Q. Did you belong to the carman's union in 1955?

A. Yes, sir, I did.

Q. How long have you been a carman?

A. Well, ever since 1919.

Q. Did you work during the 1955 strike?

A. Yes, sir, I did.

Q. After the strike was over, how long did you remain a member of the union?

A. Something near eighteen months.

Q. Then what happened?

A. They expelled us from it, fined us \$5 a day and expelled us from the union.

Q. They fined you \$5 each day you worked during the strike?

A. Yes, sir.

Q. Did you pay the fine?

A. No, sir.

Q. And for that reason they expelled you—all right, that is all.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

E. V. CHAPPELL was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Tell the Court your name and address.

A. E. V. Chappell, Corbin, Kentucky.

Q. Are you employed by the Louisville & Nashville Railroad Company?

[fol. 36] A. Yes, sir.

Q. In what capacity?

A. Car repair helper.

Q. At Corbin?

A. Yes, sir.

Q. You belong to the carman's organization?

A. No, sir.

Q. Did you belong to that union at one time?

A. Yes, sir.

Q. When?

A. I joined in 1946.

Q. How long did you remain a member of it?

A. Fall of '49.

Q. Did you work during the 1955 strike?

A. Yes, sir.

Q. As a result of having worked during the 1955 strike, will you relate to the Court, Mr. Chappell, anything that occurred to you after the strike was over with reference to your employment?

A. Well, except a few little things along the job, I didn't have so much seniority to hold a regular job, so I had to shift from one shift to another and during the time of that I have to keep up with where I was going to be working through the foreman by myself.

Q. Well, now, you say after the strike was over you didn't have enough seniority to hold a steady job?

A. That's right.

Q. What kind of work did you get?

A. Well, I worked as an extra man, car repair helper.

Q. Would that mean that you would get work from the emergency board, is that what you are talking about?

A. That's right.

[fol. 37] Q. Was that emergency board run like it should have been run, did you get the work you should have gotten from the position of your name on that board?

A. No, I would have to find out that there was men working younger than me and then I would go down and report up.

Q. And how many times did that occur?

A. Well, that happened just one time.

Q. When was that, Mr. Chappell?

A. August of '57.

Q. And you found out, let me get this clear, you found out that a man younger than you had gotten work on the emergency board that you were entitled to?

A. Yes, sir.

Q. You know whether that man that got that work was a union employee, a member of the union?

A. Yes, sir.

Q. Was he a man that worked during the 1955 strike?

A. No, sir.

Q. Has the local chairman down there at Corbin ever spoken to you since the strike?

A. No, sir.

Mr. Eldred: That's all.

Mr. Sandidge: No questions.

### Cross examination.

By Mr. Lyman:

Q. When did you cease to be a member of the union?

A. Along in the Fall of 1949.

Q. The Fall of '49?

A. Yes.

Q. You haven't been a member at any time since then?

A. I joined the laborer's union once, but I didn't stay in there but about three months, something like that.

[fol. 38] Q. Did you protest about this junior man having worked in your place when you should have been called?

A. No, sir.

Q. You started to tell Mr. Eldred when you found out about it you went up to see about it.

A. Yes, sir.

Q. What did you do?

A. I asked him was there anybody younger than me working, and they told me yes, and I filled out an application reporting up for work.

Q. You did fill out an application?

A. Yes, sir.

Q. Then what happened?

A. They billed me in the yard.

Q. They did put you to work then?

A. Yes, sir.

Q. So that this one time that you mentioned, you were not deprived of work by a junior man working, were you?

A. I don't understand.

Q. You weren't kept out of work that time, were you, as it turned out?

A. Up to the first time, I was.

Q. Up till the first time?

A. Yeah, first time when they set up the extra board and late in '56, then I didn't get no work until August 7th because I was out of town, August of '57.

A. That wouldn't be because they were working somebody junior, but because you were not available?

A. I was not notified.

Q. But the situation was corrected the first time you [fol. 39] complained about it?

A. Yes, sir.

Q. And you were put to work?

A. Yes, sir.

Mr. Lyman: That's all.

Redirect examination.

By Mr. Eldred:

Q. Did you leave your name and address so you could be reached if your name came up on the extra board?

A. At the time I left, I did leave my name and address, on the papers, you know, you fill out, but then I wasn't called for the extra board.

Q. But this occasion now, I want to be sure I understand what you are talking about, you were available and a junior man to you was working—a younger man than you was working?

A. Yes, sir.

Q. When you found out that, you reported that to whom?

A. I went to the Clerk, Car Department Clerk.

Q. Did he tell you why that had been done?

A. No, sir.

Q. But after you reported it to him, the thing was straightened out after that?

A. Yes, sir.

Mr. Eldred: That's all.

## Recross examination.

By Mr. Lyman:

Q. Had you made application for this emergency board work before you went out of town?

A. No, sir, there wasn't no extra board, emergency extra board at the time I went out of town. It was set up and then they was working when I found out about it.

[fol. 40] Q. So you got to work on it as soon as you made your application for the first time, is that correct?

A. That's right.

Q. You know, don't you, that you have to make application under the rules before you can work on the emergency board?

A. Yes, sir.

Mr. Lyman: That's all.

## Redirect examination.

By Mr. Eldred:

Q. Did they have your name at the time this younger man got the job you should have had?

A. Yes, sir, they had my name.

## Recross examination.

By Mr. Lyman:

Q. They didn't have your name on an application form, though, did they?

A. The way they do that, you don't fill out an application until you report for work, but if you don't know they are working, you don't know to go down and fill out the application.

Mr. Lyman: That's all.



D. A. LEE was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Tell the Court your name and address.

A. D. A. Lee, Louisville, Kentucky.

Q. Are you employed by the Louisville & Nashville Railroad Company now?

[fol. 41] A. Yes, sir.

Q. As what?

A. Electrical apprentice.

Q. How long have you been employed by the L. & N.?

A. Since July 3, 1953.

Q. Do you belong to the electrician's union?

A. No, sir.

Q. Did you at one time?

A. Yes, sir.

Q. When did you belong to the union?

A. From the last of '53 to the last month of '54.

Q. Did you work during the 1955 strike?

A. Yes, sir.

Q. Now, after the '55 strike was over, Mr. Lee, will you tell the Court whether you had any trouble with your job, or whether anybody was run around you on your job?

A. Well, I had numbers of troubles on the job, but there was a man run around me, yes.

Q. First, tell what trouble you had on the job?

A. Well, there was quite a few things happened like these others stated, like lunch and tools in their boxes and everything, things like that happened, but this case where they run this apprentice boy around me—that is the one you are most interested in?

Q. Yes, tell us about that.

A. Well, it would be contrary to what this other lawyer told us. He said if they did amend this injunction that the company would take care of those men, you know, that did work during the strike. For them to upgrade them, the company and the union both have to agree on it, and

this was right after the strike, and this boy, they run him around me, they upgraded him, and so I went to see the [fol. 42] union official about it, it was either my local chairman or my general chairman, I don't know which, and he told me since I worked during the strike I wouldn't be upgraded. So, my dad—

Q. Wait just a minute—let me see if I understand you as you go along—you say that after the strike was over, a man was upgraded around you, was that man younger or older in seniority?

A. He was younger.

Q. Now, was he a man that worked or didn't work during the 1955 strike?

A. He didn't work.

Q. Was he a member of the union?

A. Yes, sir.

Q. And so he was upgraded. Now, you made complaint about that, either to your local or general chairman.

A. Yes, sir.

Q. And were told what?

A. That I wouldn't be upgraded because I worked during the strike.

Q. All right, what else happened?

A. I went to see my dad and told him if that is the way the company was going to treat us, I was going to quit, because I didn't have to put up with that. I was a young man, I could go somewhere else and get a job. He told me no, they have an injunction against that, and we will go up and see the head personnel man and see what he says about it. So, he got permission from his foreman and we went up to the head personnel man, Bob Strucker, at that time, and so Mr. Strucker said he didn't know anything about it, and he called our general foreman at that time, which was Mr. Divel, and he was on vacation. So, he called Mr. Hite, that is my assistant foreman up there, and [fol. 43] Mr. Hite said he didn't know anything about them upgrading a man younger than me, and said that he would straighten it out.

So, about two days, they upgraded me. They left him upgraded and they upgraded me, and the way I understand it, I couldn't be for sure, but I was told by union men that the company didn't agree with it, and so they abolished

that job I was working on, and I was sent back down and they sent the other boy down at the same time.

Q. After you had been told this by the local or general chairman, you went to management about it, and as result of that, both the other man and you were put back down.

A. No, he was still working, but they did upgrade me.

Q. I see, they did upgrade you, and then later they downgraded both of you?

A. In about three days, they abolished the job I was on and downgraded him, too.

Q. Now, have any union employees out at the place you worked made any statements to you this past year about joining the union?

A. Yes, sir, I have been asked.

Q. What did they tell you would happen if you didn't?

A. I have been told that I wouldn't get to go on seniority as an electrician if I didn't join the union, but not long after the strike, about six months after the strike—first, I went out on the strike for about a week, and I didn't know whether to work or not to work. I mean I was just a country boy, I didn't know anything about this, you know, what this was, and I hadn't been married but about a year, and I had a wife and child about two weeks old, so I just, I had to go to work.

[fol. 44] If I remember right, I went to my general chairman and asked him if we would make any money while we was out, you know, on the picket line, and he told me at that time he didn't know for sure, so I told my local chairman I would have to go to work. I went in and held my own job down for two weeks, apprentice. The first day I went in, they offered me a job as electrician, the company did, but I didn't take it, I stayed on my own job for about two weeks. They started giving us a hard way on the picket line, so I told them I would take a job as a mechanic. I worked two days as an electrician, and they asked me if I would go out and run the engine, fire on the engine, rather, and I told them yes, I would go out and fire on the engine, and I fired for two days and they put me on as an engineer. That's the reason, right after the strike, after they set this boy up around me, I didn't think the company would let them do it, but they did anyway, so I was aiming to quit, if I thought that was the way they were going to treat us.

Q. Did you try to join the union after the strike?

A. Yes, sir, they blackballed me.

Mr. Eldred: That's all.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

STANLEY ELLIS was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Tell the Court your name and address?

A. Stanley Ellis, Route 2, Box 53, Fairdale, Kentucky.

Q. Are you employed by the L. & N.?

A. Yes, sir.

[fol. 45] Q. What is your job?

A. Carman.

Q. What sort of job do you do?

A. I am running a punch now, duplicating punch, punch material for cars.

Q. How long have you been in the car department?

A. Since '22.

Q. Do you belong to the carman's union?

A. No, sir.

Q. Did you at one time?

A. Yes, sir.

Q. When did you belong to that union?

A. When the strike was over, they let me out.

Q. You belonged to the union up until the time of the 1955 strike?

A. Yes.

Q. You work during that strike?

A. Yes, sir.

Q. Did they expel you after that?

A. Yes. Well, I never did try to get in, fined you \$50 to get back in the union.

Q. You refused to pay the fine?

A. Yes.

Q. Have you been an inspector in the car department?

A. I have been inspecting since '23, up until last year, when they had anything on the road.

Q. Now, following the 1955 strike, when you were still working as an inspector in the car department, did you miss any inspection trips that you should have had?

A. Yes, sir, I did.

Q. Tell the Court about that.

A. I did last year, they put four men out, young men [fol. 46] ahead of me, all union men.

Q. Were they men that did not work during the strike?

A. No, they didn't work.

Q. And that was last year?

A. Yes, '57.

Mr. Eldred: You may ask him.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

ALBERT W. WASHER was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

#### Direct examination.

By Mr. Eldred:

Q. Tell the Court your name and address.

A. Albert W. Washer, Crestwood, Kentucky.

Q. You employed by the Louisville & Nashville Railroad now?

A. Yes, I am.

Q. Where and in what kind of a job?

A. South Louisville shops, load lugger operator.

Q. How long have you been working for the L. & N.?

A. September 23, 1936.

Q. In the car department?

A. Not all together, no.

Q. How long in the car department?

A. Approximately one year in the car department, the rest of the time in the motorized equipment department.

Q. Do you belong to the carman's union?

A. No.

Q. Did you at one time?

A. At one time, yes.

[fol. 47] Q. When was that?

A. I believe that was 1954, I belonged to the union twice in the period from the time I was employed—first time by the company union—I will say three times—the second time by the union that received the contract, now holding the contract, A. F. of L., and I was in the Laborer's, Fireman and Oilers Union then, and then I got in the Carman's Union. Why, I couldn't tell you, because I am in transportation. However, since I was out of Shop 13, Freight Car Department, I was assigned to the Car Department Union, Local 576.

Q. Now, did you work during the 1955 strike?

A. I did.

Q. Have you had any difficulty since the 1955 strike with obtaining work to which you felt you were entitled on the basis of your seniority?

A. Some. I had one occasion where my machine was broke down for approximately three days.

Q. Was that the load lugger?

A. Load lugger was broke down for three days.

Q. When was that?

A. That was in 1957. Spring of 1957, I think in April, and I was supposed to have been asked whether I wanted the boon crane operating job which was open at the time, but was not asked, but was assigned to a lift truck, and I made complaint of it to my foreman, I was going to file a time claim, and he said he would let me know about it. After approximately an hour went by, I was notified by my foreman that the committeeman of our department said I was not qualified to operate this machine.

Q. That's the union committeeman?

A. That's correct.

Q. Were you qualified to operate it?

[fol. 48] A. I was qualified and told him I had forgotten more about it than this man would ever know.

Q. Now, when your load lugger broke down, it took how many days to repair it?



A: Approximately three days, two days and a half to be exact.

Q. During the time that your machine was being repaired, are you entitled to work any job that is then open?

A. If there are any jobs open and I have the seniority to occupy those jobs, and my machine is broke down or incapacitated at the time, I am supposed to go on the job that I have the seniority to hold.

Q. As I understand it, when your machine broke down, there was a job then open for a movable boone crane job?

A. That's correct.

Q. Did you get that job?

A. No, sir.

Q. Was it assigned to someone else?

A. Yes, sir.

Q. Was this man junior or senior to you in seniority?

A. Very much junior.

Q. Was he a member of the union?

A. Yes, sir.

Q. Was he a man that worked during the 1955 strike?

A. Yes, sir.

Q. Work or walk out?

A. No, he walked out—excuse me.

Q. That's the reason I asked you again. So, now, that there may be no misunderstanding, he did not work during the strike?

A. No, sir, he did not work.

Mr. Eldred: Believe that's all.

#### Cross examination.

By Mr. Lyman:

[fol. 49] Q. You say you missed out on three days work on this crane job?

A. No, sir, I did not say I missed out on three days. I missed out on the day I was supposed I would be put on this movable boon crane.

Q. What did you do instead, did you lose work?

A. No, sir, I was put on the lift truck, which was a lower paid job.

Q. For how long?

A. For the next two days and a half.

Q. After that, where did you work?

A. Went back on my regular truck.

Q. When your machine was repaired?

A. Yes, sir.

Q. You said you were going to put a time claim in—did you?

A. No, sir, I did not, because they told me I wasn't qualified.

Q. You could have disputed that by filing a time claim, couldn't you?

A. I did dispute it.

Q. You could have disputed that by filing a time claim, couldn't you?

A. Well, I didn't know who to file it with. I couldn't get any information on the fact.

Q. You don't know how to file a time claim?

A. I never had to.

Q. That doesn't answer my question, don't you know how to file a time claim?

A. I never filed one and I don't know yet how to file one. I asked to be advised, but I wasn't.

[fol. 50] Q. I am sorry, I didn't hear you.

A. I said I asked to be advised how to file one, but wasn't.

Q. Who did you ask?

A. My foreman.

Q. Didn't he know?

Evidently he said I wasn't qualified, so I gave up—what is the use of trying to do anything when you can't get anything out of your own foreman.

Q. Your position was if you had wanted to file a time claim and had taken the trouble to file it, the agreement would have entitled you to this position, is that correct?

A. That may be so, but at the time —

Q. Answer the question—is that what your position is?

A. Yes.

Q. And it was the foreman that turned you down and said you weren't qualified?

A. That's right, he said because the committeeman told him that I wasn't qualified to operate the machinery in question.

Q. So you dropped the matter?

A. I dropped it.

Q. Rather than go to any further trouble?

A. Well, I had a little trouble after that is the reason why I dropped most of it.

Q. What craft do you work in now?

A. I don't know what craft you consider us in. We are considered no craft at all, you might say. We are represented, supposedly, by a man there that, I think we are under about four or five different crafts, but we ourselves are not represented by any one craft except myself who came out of the car shops, and I was represented recently [fol. 51] by Mr. Logan Broadway there, he is the local chairman of the Carman's Union.

Q. You say you were represented by him recently?

A. Recently, yes.

Q. You belonged to them in 1954, I think you said?

A. '54, early part of '54.

Q. What kind of work were you doing then?

A. In transportation, I was a material expediter at the time.

Mr. Lyman: I think that's all.

Redirect examination.

By Mr. Eldred:

Q. You say Mr. Snider was your foreman at the time that you didn't get this job you should have had?

A. Yes, sir, Mr. C. F. Snider.

Q. And he told you that the union representative said you weren't qualified?

A. That is correct.

Q. What was the name of the union representative?

A. James W. Murphy.

Q. And were you qualified, as a matter of fact?

A. Yes, sir.

Q. Did you have any trouble with Murphy over that?

A. Had quite a bit of trouble.

Q. What was it?

A. Well, one afternoon we came out after this incident, we come out of the shop, gate number 4, met me around

behind the bus, said you have been interfering with my business. I said now you go on away from me and leave me alone, I don't want to have any trouble with you, and I mean that. So, then I walked away from him. About a week later, the same thing happened, and I walked away [fol. 52] from him again, and the following—about three days after that, I told my foreman, the other foreman, assistant foreman, Mr. C. A. Harris, that I was getting tired of this man jumping on me when I went out of the gate, and if he didn't leave me alone, that one of us was going to leave that place, and I was damned sure it wasn't going to be me—pardon me.

So, he accosted me over that, Mr. Harris went and told this man what I said, and he accosted me over that the same afternoon.

Q. Murphy did?

A. Mr. Murphy, and he said I am going to knock your head off, and he set his lunch box down and I hauled off and clobbered him one in the mouth, and he grabbed my jacket, and I was getting ready to swing him one again when he kicked me in the groin. I still say he is yellow and I will whip any time I get a chance to whip him—still mad about it.

Q. Don't comment like that. Have you had any further trouble with him since then?

A. I haven't had a bit of trouble since, he hasn't opened his big mouth.

Mr. Eldred: That's all.

Mr. Lyman: No questions.

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H. A. HARGRAVE was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

#### Direct examination.

By Mr. Eldred:

Q. Tell the Court your name and address.

A. H. A. Hargrave, 560 Lilly Avenue, Louisville.

Q. Are you employed by the L. & N.?

[fol. 53] A. I am, sir.

Q. In what job?

A. Machinist helper.

Q. Where?

A. Shop 17.

Q. Is that in South Louisville?

A. Yes.

Q. How long have you been a machinist helper?

A. Since October, '39.

Q. Do you belong to the International Association of Machinists?

A. I do not.

Q. Did you at one time?

A. Yes, sir.

Q. When did you belong to it, Mr. Hargrave?

A. From the time it was organized until '46, and then from '50 to '55.

Q. Did you work during the 1955 strike?

A. I did.

Q. Have you attempted to go back in the union since that time?

A. I have been approached, I haven't went back in, no, sir.

Q. Have you had any difficulty with being set up as a machinist?

A. Very much so.

Q. As result of that working during the 1955 strike?

A. Not from the result of working, I don't think so much.

Q. What was the trouble, Mr. Hargrave?

A. Well, the trouble was that I worked two years and one month during the war as temporary machinist, and I [fol. 54] didn't work the full four years. For that reason I didn't work the full four years, they wouldn't promote me.

Q. Has the union refused to agree that you be set up?

A. Yes, sir.

Mr. Eldred: That's all.

Mr. Lyman: No questions.

Mr. Sandidge: No questions.

Mr. Eldred: Court please, I want to get into evidence the releases that were signed by the twenty-eight plaintiffs

in this case on the payment of \$5,000 damages when the case was agreed upon, and the consent decree was entered. That was paid \$2,500 by the railroad and \$2,500 by the unions. I don't think there is any dispute about that. If the counsel for the unions will agree to stipulate, otherwise I will put Mr. Landrum on the stand and prove the release.

Mr. Lyman: We will stipulate that was done, your Honor, but we will object —

By the Court: Competency or relevancy. It may be admitted, subject to your objection of competency or relevancy.

Mr. Eldred: If your Honor please, this original release was signed by each of the 28 original plaintiffs on duplicate originals, all of them didn't sign the same document. I have here a photostatic copy of the release but it only has three signatures on it because that duplicate original was only signed by three. Now, subject to the objection as to competency and relevancy, will counsel stipulate this photostat copy may be introduced as a true copy of the release and the same type of release was signed by all 28 original plaintiffs?

Mr. Lyman: I have no objection to you substituting a photostat for the original.

[fol. 55] By the Court: I understand that counsel stipulate that this is a correct copy.

Mr. Eldred: Counsel stipulate that this is a correct copy of the release signed by all 28 original plaintiffs and pursuant to that release that \$2,500 was paid by the Louisville & Nashville Railroad and \$2,500 by the union defendants.

Mr. Lyman: That's correct.

Mr. Sandidge: We stipulate, too.

By the Court: Plaintiff's Exhibit 1.

(Exhibit is so identified and filed in the record.)



W. S. SCHOLL was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Give your name to the reporter.

A. W. S. Scholl.

Q. What position do you now hold with the Louisville & Nashville Railroad Company?

A. Director of Personnel.

Q. As Director of Personnel, do you have in your office records showing the date of certification of the six shop craft unions which operate on the L. & N.?

A. Yes, sir, we have.

Mr. Sandidge: Just one moment, were you subpoenaed to bring those records here?

The Witness: I was subpoenaed to bring a file called [fol. 56] Consolidation of Round House and Diesel Shop Facilities of South Louisville Shops.

Mr. Sandidge: Did you bring those with you?

The Witness: Yes.

Q. Do you know, Mr. Scholl, when these six shop craft unions who are here moving for modification of injunction were certified as the official bargaining representatives of the six shop crafts on the L. & N.?

A. According to our records, the electrical workers, helpers and apprentices were certified on September 29, 1943, and the others were certified on July 24, 1940.

Q. Thank you, sir. Will you tell us the number of men who were employed in the South Louisville shops just immediately before the beginning of the 1955 strike?

A. At South Louisville shops?

Q. Yes, sir, in the shop crafts.

A. According to the records furnished our office by the auditor of disbursements, which is our payrolling office, immediately before the strike there were 2,436 employees at South Louisville in the shop crafts.

Q. Do you know how many men worked during the strike, on an average—you could give the high and the low for the number of days in the strike, if you have that?

A. The way it has been furnished to us, in accordance with some Interstate Commerce Commission reporting, I believe, is on March 14th, which was the first day of the strike, there were 1,328 men working. On April 1st, the next date, there were 1,400. On April 15th, there were 1,425. On May 3rd there were 1,298. On May 10th, which was the last day, there were 1,323.

Q. Do you have the same figures for Boyles?

A. Yes. On March 10th, there were 687. March 14th, 183. [fol. 57] April 1st, 119. April 15, 185. May 3, 178. May 10, 171.

Q. Can you give me those same figures for the entire system on your shop crafts?

A. For the entire system, on March 10th, 5,255. On March 14th, 2,241. April 1st, 2,144. April 15th, 2,359. May 3rd, 2,105. May 10th, 2,179.

Q. And the first day of the strike was what day?

A. Was March 14th.

Q. Following the termination of the strike, was an agreement entered into between the carrier and the six shop craft unions with respect to the return of men to work?

A. Yes, it was.

Q. You have a copy of that agreement?

A. Yes, I have. It was signed on stencil and that is a mimeographed copy.

Mr. Lyman: This doesn't seem to be a complete contract. Exhibit A, which seems to be a part of it, isn't attached.

I might say that I didn't object at the beginning of Mr. Scholl's testimony, but it now appears that he is apparently giving statistics to tie in the testimony of all the individual employees we had here this morning. Unless some other purpose of relevancy of these facts and figures and this agreement is shown, we object to his testimony and this exhibit.

By the Court: I will overrule that.

Mr. Lyman: I further object to the exhibit on the ground

that on the face of it, it is not a complete copy of the agreement.

Mr. Eldred: Well, your Honor please, our sole purpose in introducing this is one particular paragraph which appears in it, which I shall read to the Court, it is on page [fol. 58] 2 of the agreement, and appears to be a separate unnumbered paragraph following paragraph number 5, which reads as follows:

"Immediately upon the execution of this agreement, the organizations will instruct their members to report for work at 6 A. M. on May 11, 1955, under the following conditions."

There are a number of conditions, the one I am particularly interested in and want to call to the Court's attention is (a) which reads as follows:

"All employees will be restored to service without prejudice or reprisal and with all seniority and all other rights unimpaired including all rights under group and other insurance plans."

That is the only part that is pertinent to our case, and that is the reason I wish that copy be placed in evidence.

By the Court: All right, you object to the agreement and I will sustain that. Do you have any objection to the excerpt that was read?

Mr. Lyman: I have no objection to the excerpt except it has no pertinence whatsoever.

By the Court: Overruled.

Q. Now, that excerpt that I read, is that part of the agreement which was entered into by and between the Louisville and Nashville Railroad Company and the fifteen cooperating railway labor organizations involving the settlement of the strike?

A. Yes, it is.

Q. And did those fifteen cooperating labor organizations include the six shop craft unions?

A. According to this record, it did, yes.

[fol. 59] Q. Was that paragraph that I read part of the agreement that was made following the strike?

A. Yes, it is.

Q. Mr. Scholl, at the present time is it necessary for the Louisville & Nashville Railroad to maintain special police at any points upon its system by reason of the matters which occurred during and after the 1955 strike?

A. Yes, sir, it is.

Q. Tell the Court about that, if you please.

A. Right after the strike, it was necessary for us to maintain special police at practically every terminal on our system. At the present time we have been able to reduce that to men are escorted to work or watched coming to and from work on only two terminal points on the system at the present time.

Q. Where are those terminals?

A. I rather not answer that, because then it says where they are not, and I don't want more trouble tomorrow morning.

Q. I see. I will withdraw the question.

A. If you please.

Q. As Director of Personnel, are you in charge of all personnel for the entire Louisville & Nashville Railroad Company system?

A. We maintain most personnel records concerning grievances and so forth.

Q. Will you tell the Court whether following the close of the 1955 strike you have had few or many complaints which have reached your office, of abuse or mistreatment of employees who worked during the strike by men who did not?

A. We have had many. As a matter of fact, following [fol. 60] the strike we added an additional position of Assistant Director of Personnel, and since that time I have devoted a great deal of my time to running down these complaints, making investigation of them and assisting federal authorities and so forth, yes.

Q. Have you in your capacity as Director of Personnel received many expressions from the employees of the railroad with respect to continuation of the injunction in the Wright case without being modified?

A. Yes, sir, we have, even since we began talking about the union shop, that is, the national officers of the organization came on the property last year, we have had many expressions from the employees, individually coming into the office, calling on the telephone, and by petition and cards and so forth, asking us to do what we could to maintain the injunction. We have received, I can't say the exact number, but petitions from over two thousand employees, and this morning there was delivered to my office, I have them here in the court room, about eight hundred cards signed by shop craft men, and about four hundred signed by clerks, protesting any change.

Q. Protesting any change in the injunction in the Wright case?

A. Yes, they say they are opposed to any change or modification in the injunction in the O. V. Wright case.

Mr. Eldred: I believe that is all.

Cross examination.

By Mr. Lyman:

Q. Mr. Scholl, do you know of any other major railroad in the country that does not have a union shop agreement in effect?

A. I have my troubles with the L. & N., sir, I don't know about the other railroads.

[fol. 61] Q. What is the answer to the question now, that you don't know?

A. I have heard that most other railroads have union shop agreements, yes.

Q. Do you know of any other major railroad that does not have one?

A. I represent the Louisville and Nashville Railroad Company, and I don't know, sir.

Mr. Sandidge: Your Honor, object on the ground it makes no difference what any other railroad has.

By the Court: Overruled, I don't know that it makes any difference.

The Witness: I could put it this way—

Q. You could answer the question yes or no, Mr. Scholl.

Mr. Sandidge: He can answer the question, your Honor—your Honor he can say yes or no, and of course he can explain his answer.

Mr. Lyman: Let's have an answer yes or no first.

The Witness: Will you repeat the question.

Q. Do you know of any other major railroad in the country that does not have a union shop agreement?

A. I do not, no.

Q. Mr. Scholl, you gave us figures for the employees that were working at these ~~various~~ points, South Louisville Shops and Boyles, at various dates during the strike, and also figures for the system. Do those figures include people that were hired after the strike commenced?

A. These were people who were on our payroll on these particular dates. I would assume that they were people who were hired after the strike commenced, yes.

Q. Any that were hired after it commenced would be reflected in these figures?

A. That's true, yes.

[fol. 62] Q. You know for a fact whether or not there were people hired after the strike commenced in the various crafts?

A. In the shop crafts, there were relatively few. I would say very few.

Q. You have any figures on that?

A. No, I haven't.

Q. You mentioned the dates on which these organizations were certified, Mr. Scholl. You mentioned the International Brotherhood of Electrical Workers as having been certified in 1943, and all the others in 1940. Had the company bargained with any or all of these organizations at some previous time or times for these crafts?

A. You are going back before my time. I don't know in the shop craft.

Mr. Lyman: That's all.



## Redirect examination.

By Mr. Eldred:

Q. Can you tell us, Mr. Scholl, how many employees the company now has in the six-shop crafts over its entire system, as of today?

A. As of today is something I can't do, we don't have the figures as of today.

Q. In your best judgment, how many do you have?

A. I would put it at about 4,700.

Mr. Eldred: That's all.

J. W. RITTER was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

[fol. 63] Direct examination.

By Mr. Eldred:

Q. Give the Court your name and address.

A. John W. Ritter, 4000 South Brook.

Q. Are you employed by the Louisville & Nashville Railroad Company?

A. I am.

Q. As what and where?

A. Electrician, in Shop 17 now.

Q. Prior to February 17, 1947, were you employed in the South Louisville roundhouse as an electrician?

A. I was.

Q. During the 1955 strike, how many men were employed in the South Louisville roundhouse, in all the crafts?

A. I imagine close to seventy, sixty or seventy.

Q. And how many of those men, what percentage of them worked during the 1955 strike?

A. There were about eight or ten that went out on the strike, the rest of them worked.

Q. How long have you been employed as an electrician by the L. & N.?

A. As electrician, I first worked as electrician, I believe it was June 2d, 1942, or June 6th, of '42.)

Q. Did you belong to the electrician's union prior to the 1955 strike, or at the time of that strike?

A. I was one of the first three that joined in New Orleans.

Q. When the union was formed?

A. Organized.

Q. And immediately prior to the 1955 strike, did you hold an official position with the electrician's union here?

A. I was local chairman.

[fol. 64] Q. Did you work during the 1955 strike?

A. I did.

Q. Now, as result of working during the 1955 strike, what has happened to your union membership?

A. I was expelled for life.

Q. Is it not possible for you to rejoin the union?

A. No, I don't think so, not that I know of.

Mr. Eldred: You may ask him.

Cross examination.

By Mr. Kramer:

Q. Did you say you were expelled for life?

A. Yes, sir.

Q. You object to the union shop agreement?

A. I would under that condition, yes.

Q. How would that affect you?

A. Well, now, I don't know the law.

Q. Is it your understanding if there were a union shop agreement, that you would lose your job?

A. I don't know that.

Q. Is it your understanding that you would be—

Mr. Sandidge: Object, your Honor, to this line of questioning, on the ground it is a question of law.

Mr. Kramer: If this man has no understanding of whether he would be affected or not affected by a union shop agreement, I ask that his testimony be stricken.

The Witness: I would be affected.

Q. In what way?

A. In a lot of ways.

Q. How would you be affected?

A. Any man that works there would be affected.

Q. I am asking you what is your understanding of how you would be affected by a union shop agreement?

A. I am asking you now, I would be affected.

[fol. 65]. Q. You answer the questions.

Mr. Sandidge: Your Honor, we are getting no place here.

Mr. Lyman: Your Honor, this man has been brought in as a party to this case. He can be cross-examined as to his theory and the reasons he is urging as a party in the case.

Mr. Sandidge: May it please the Court, I don't know whether a party can be examined on theories of law concerning the case. He can be examined on facts.

By the Court: Mr. Ritter seems to be able to say he doesn't know the law and avoid answering the question about something he knows nothing about.

Mr. Kramer: Might call attention to the fact that Mr. Ritter is Mr. Eldred's witness and not—

By the Court: You don't have to call my attention to that. I have been around the Court a few times and I am able to know who produces a witness and I assume when a party introduces a witness that they are sponsoring that witness to further their presentation of their case.

Mr. Kramer: Objection is being made that this witness doesn't know. I submit if this witness has no understanding of whether he will be affected or not by a union shop agreement, his evidence is entirely irrelevant.

By the Court: Hasn't Mr. Ritter testified that he was a member of the union, that he worked during the strike, and that he was expelled by the union. Now, what else is it, what is it you want to ask him.

Mr. Kramer: I would like to know why he objects to the union shop agreement.

By the Court: Is that important? Hasn't he a right [fol. 66] to object to it?

Mr. Kramer: Yes, but we would like to know on what basis he objects.

By the Court: He has said he was expelled because he worked during the strike.

Mr. Kramer: I believe your Honor knows that under Section 211 of the Railway Labor Act, if membership is denied to him for any reason other than non-payment of dues, he is exempt from the union shop agreement.

By the Court: That's right, what the law provides, but is that important?

Mr. Kramer: I think that shows that he can not possibly be affected by any union shop agreement.

By the Court: What difference does it make? He could still have an objection to it. This is still a free country.

Mr. Kramer: But his objection to something that doesn't affect him can have no relevance.

By the Court: He is an employee.

Mr. Kramer: Yes, but the union shop agreement doesn't affect him if his testimony is true.

Mr. Eldred: That's a question of law, your Honor, and not for this witness to answer.

By the Court: He says he can't answer it. I want you gentlemen to have an opportunity to cross-examine him—I don't want you to feel that I am precluding your examination.

Mr. Kramer: I have no further questions.

The Witness: Your Honor, I may, I will say, I am a Christian, I believe what Christ said when he was asked the first two laws. I believe every bit of it in my heart. That's one objection. I believe in Christ.

By the Court: All right, that's all Mr. Ritter.

[fol. 67] HAROLD JOHNSON was called as a witness by counsel for the plaintiffs, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Eldred:

Q. Give your name and address to the reporter.

A. Harold Johnson, 175 Gillette.

Q. Are you employed by the L. & N. now?

A. I am.

Q. As what?

A. As electrician.

Q. Where?

A. Shop 17.

Q. Do you belong to the International Brotherhood of Electrical Workers?

A. I did up until the strike.

Q. How long did you belong to them before the strike?

A. Well, about '45, I guess, when I joined.

Q. And did you work during the 1955 strike?

A. I did.

Q. As result of working during the 1955 strike, what were you told with respect to your union membership?

A. Well, they just threw me out, that was all.

Q. Did you receive a notice?

A. I believe I did, yes, two of them.

Q. Then did you receive a subsequent notice that you were fined?

A. I did.

Q. Assessed a \$50 fine plus \$16.60 a day for every day you worked during the strike?

A. I did.

Q. Did you pay the fine?

[fol. 68] A. No, sir.

Q. Were you expelled from the union?

A. Yes, sir.

Q. Have not been readmitted?

A. No.

Q. Will you file both of these letters as parts of your testimony and we will mark them Plaintiff's Exhibit 5 and 6.

(Exhibits are so identified and filed in the record.)

Q. Are these the two letters you received?

A. Yes, sir, they are.

Q. How many of the electricians employed during the strike at the roundhouse worked during the strike?

A. All nine of them, that's all there was.

Mr. Eldred: I want to read one portion of this letter of April 20th, 1955, directed to you, and signed by A. L. Schaffner, Recording Secretary—

"As you did not appear April 8th, 1955 before the Executive Board to stand trial for violating Article XXVII Section 20 of the International Brotherhood of Electrical Workers Constitution you were found guilty, and assessed as follows:

"You may not attend Meetings of Local #1353 I.B.E.W. for 2 years.

"You may not hold Office in Local #1353 I.B.E.W. for 5 years.

"You are assessed \$50.00 plus \$16.16 per day from March 14th, 1955 until conclusion of Legal Strike against the Louisville & Nashville Railroad."

I believe that's all.

[fol. 69] Cross examination.

By Mr. Lyman:

Q. Did you appear for trial in those charges?

A. No, sir.

Q. Did you appeal from the assessment of the fine against you?

A. No, sir.

Q. You realize that these exhibits, just put in did notify you that you had the right to appeal?

A. Yes.

Q. In other words, you didn't contest the union's right to take this action against you?

A. No.

Mr. Lyman: That's all.

Mr. Sandidge: No questions.

Mr. Eldred: That is all the evidence.

\* By the Court: You gentlemen want to introduce any testimony?

\* Mr. Lyman: No, we have no testimony, your Honor. As I indicated before, it is our position that all of the testimony that has come in today is completely irrelevant to the issue before the Court on this motion.



[fol. 70]

## IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 1—Filed February 3, 1958

## RELEASE

Whereas, the undersigned are employees of the Louisville & Nashville Railroad Company and are all of the plaintiffs in a certain action entitled O. V. Wright, et al. v. System Federation No. 91, Railway Employees' Department, American Federation of Labor, Louisville & Nashville Railroad Company, et al., now pending in the United States District Court, Western District of Kentucky, at Louisville; and known as action No. 942 in the files of said court; and

Whereas, Counts 1 to 29, inclusive, of the complaint, filed for and in behalf of the undersigned in said action, allege that through and by the acts of the defendants therein; they have been denied certain rights and benefits to which they are and have been entitled under the terms and provisions of certain collective bargaining agreements by and between the L. & N. Railroad and System Federation No. 91, and that the undersigned will continue to be deprived of certain rights and benefits in the future if the defendants are not enjoined from engaging in certain acts and practices, all of which allegations are denied by defendants; and

Whereas, it is the mutual desire of all of the parties to said action to settle and dispose of all issues in dispute among them in the following manner:

- (1) The entering of a consent decree in the aforesaid action, the purpose of which will be to protect the undersigned against any future acts or practices of or by the defendants which will deny to the undersigned any of their rights and benefits under the collective bargaining agreements now in effect or which may hereafter be entered into in accordance with the Railway Labor Act by and between the [fol. 71] L. & N. Railroad Company and System Federation No. 91, a copy of which consent decree is attached hereto.

- (2) The waiver and release by the undersigned of any and all claims which they now have or may hereafter assert against defendants in the above described action for alleged wrongful acts done prior to the date of this release.
- (3) The payment of the sum of \$5000.00 by the defendants to the undersigned.

Now, Therefore, in consideration of the sum of \$5000.00 this day paid to the undersigned by the defendants in the above described action, the receipt of which is hereby acknowledged, and the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto, the undersigned, for themselves and their executors, administrators and assigns, do hereby release and discharge

System Federation No. 91, Railway Employees' Department, American Federation of Labor,

J. T. Powell, President, System Federation No. 91

J. Hugh Whelchel, Secretary, System Federation No. 91

International Association of Machinists,

R. J. May, General Chairman of International Association of Machinists.

International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America,

P. G. Williams, General Chairman of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America

[fol. 72] Sheetmetal Workers International Association,  
J. Hugh Whelchel, General Chairman of Sheetmetal Workers International Association

Brotherhood Railway Carmen of America,

J. T. Powell, General Chairman of Brotherhood Railway Carmen of America

International Brotherhood of Electrical Workers,

T. H. Patterson, General Chairman of International Brotherhood of Electrical Workers

International Brotherhood of Firemen, Oilers, Helpers,  
Roundhouse and Railway Shop Laborers

Ray Abner, General Chairman of International  
Brotherhood of Firemen, Oilers, Helpers, Round-  
house and Railway Shop Laborers.

Railroad Lodge No. 205,

International Association of Machinists,

C. A. Babb, President

C. M. Tydings, Secretary

K. Heidel, Treasurer

O. C. Lee, Committee Chairman

H. E. McIntyre, Committeeman

Rufus Goodman, Committeeman

Frank Berger, Committeeman

Local No. 1073,

International Association of Machinists,

M. F. Hodge, President

W. M. Sharpe, Vice President

N. C. Jenkins, Secretary

Lloyd F. Johnson, Treasurer

T. R. Trosper, Committee Chairman

Lesley Gooden, Committeeman

Rein Teague, Committeeman

[fol. 73] Subordinate Lodge No. 102,

International Brotherhood of Boilermakers, Iron Ship  
Builders and Helpers of America,

W. W. Adams, President

James C. Lovelace, Vice President

Russell L. Preston, Secretary

J. C. Brock, Treasurer

R. B. McMasters, Committee Chairman

J. C. Brock, Committeeman

H. A. Stromier, Committeeman

B. C. Elder, Committeeman

J. D. Hall, Committeeman

J. M. Wermuth, Committeeman

Pan American No. 576,

Brotherhood Railway Carmen of America

E. C. Sattich, President

John J. Sillinger, Secretary  
 Herman H. Fox, Treasurer  
 W. O. Poteet, Committee Chairman  
 Daniel DeWeese, Committeeman  
 W. A. Wilson, Committeeman  
 Ray Hall, Committeeman

New Bridge Lodge No. 284,  
 Brotherhood Railway Carmen of America,  
 H. P. Scrivner, President  
 Pearl Miller, Vice President  
 Floyd Neikirk, Secretary  
 Stone Glass, Treasurer  
 Thomas Blackwell, Committee Chairman  
 Pearl Miller, Committeeman  
 Ollie Richardson, Committeeman

[fol. 74] Local No. 445,  
 Sheetmetal Workers International Association  
 William T. Sils, President  
 Claude McKinnis, Vice President  
 William A. Schujahn, Secretary  
 M. Fred Canada, Treasurer  
 W. R. Denny, Committeeman

Local No. 1004,  
 International Brotherhood of Fireman, Oilers, Helpers,  
 Roundhouse and Railway Shop Laborers,  
 Turner Dever, President  
 John W. Detig, Secretary, Treasurer  
 G. F. Hutchinson, Committeeman Chairman

Local No. 362,  
 International Brotherhood of Firemen, Oilers, Helpers,  
 Roundhouse and Railway Shop Laborers,  
 Edgar Hamblin, President  
 Ed. Noe, Vice President  
 Garfield Carroll, Financial Secretary  
 W. C. Stephens, Recording Secretary  
 A. M. Jones, Treasurer  
 W. M. Harman, Committee Chairman  
 H. L. Disney, Committeeman  
 George Broughton, Committeeman

Local Union #1353,  
International Brotherhood of Electrical Workers,  
T. H. Patterson, President  
H. B. Cherry, Vice President  
F. C. Doutrick, Treasurer  
J. F. Schietinger, Recording Secretary  
C. H. Fortenberry, Committee Chairman  
Richard McDaniel, Committeeman

[fol. 75] Louisville & Nashville Railroad Company

from all claims, demands, damages, actions and causes of action whatever, predicated upon any acts, practices or conduct of the above named defendants or any of them which said acts or practices occurred prior to the date of this release, whether such claims, damages, demands, actions or causes of action are enumerated and described in the complaint aforesaid or otherwise.

In Witness Whereof, the undersigned have hereunto set their hands this 1 day of December, 1945.

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O. V. Wright

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Walter E. Lee

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Charles C. Teague

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J. W. Watkins

---

Sherman Napier

---

Will White

---

Carl W. Bowman

---

H. B. Simmons

---

Chester H. Wallace

---

C. P. Jacobs

---

E. L. Crutcher

---

Marion A. Holeman

---

Ollie Keeling

---

Joe Hibbard

(s) J. A. McDowell  
J. A. McDowell

---

Delbert W. Cloyd

(s) C. D. Walters

C. D. Walters

(s) Elvin Norman  
Elvin Norman

---

W. A. Billingsley

---

H. F. Starr

---

W. W. Barnes

---

L. B. Hines

---

Malcolm M. Couch

---

Alf Lockheart



---

W. D. Ratliff

---

C. E. Lake

---

James L. Williams

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J. R. Graham

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[fol. 77]

## IN UNITED STATES DISTRICT COURT

MOTION TO RE-OPEN—Filed February 24, 1958

The plaintiffs and intervenors move the Court to reopen the case for the plaintiffs and the intervenors on the hearing in opposition to the motion of the union defendants to modify the injunction heretofore issued in this case, for the purpose and to the extent only of considering as evidence for said plaintiffs and intervenors the attached copy of a letter, dated February 6, 1958, and written by Jake Paschall, General Chairman of the Brotherhood of Locomotive Firemen and Enginemen, to I. D. Britt, L. A. Dubose and Jack Gunnells, of Birmingham, Alabama.

In support of said motion the Court is advised that at the hearing before the Court on February 3, 1958, there testified for plaintiffs and intervenors, J. C. Laney, H. Carter, Sam Jones and Simon Durant, among others.

One of the defendant unions moving for a modification of the injunction is the International Brotherhood of Firemen, Oilers, Laborers, Roundhouse and Railway Shop Laborers, of which the General Chairman on the L. & N. System is Ray Abner, who was present in the courtroom during the hearing and, in fact, was called to testify as if under cross-examination. On February 5, 1958, General Chairman, Ray Abner, wrote to Jake Paschall, General Chairman of the Brotherhood of Locomotive Firemen and Enginemen, a letter with reference to said hearing and nam-

ing the four witnesses mentioned hereinabove (H. Carter being named as Dave Carter, and Simon Durant being named as Sam Durant). General Chairman Paschall then wrote to the three men at Birmingham named above who apparently have some connection with two of the local lodges at Birmingham, in which he copied the letter from General Chairman, Ray Abner. A copy is attached hereto marked Exhibit "A".

[fol. 78] Both General Chairman, Ray Abner, and General Chairman, Jake Paschall, intimate strongly that J. C. Laney had no business testifying before the Court in this matter on February 3, 1958. As this attitude is part of the same pattern which we have shown to the Court by the evidence adduced or introduced at the hearing, we feel that the Court should be made aware of the fact that such letters are being written with respect to witnesses who testified at the hearing and should consider such letter as part of the evidence in this case.

Marshall P. Eldred, 420 S. Fifth St., Louisville 2,  
Ky., Attorney for Plaintiffs and Intervenors.

#### Certificate

I certify that the foregoing Motion was this day served on the defendant unions by mailing true copies thereof to their attorneys, Robert E. Hogan, Kentucky Home Life Building, Louisville, Ky., and Richard R. Layman, 741 National Bank Building, Toledo 4, Ohio, and on the defendant, Louisville & Nashville Railroad Company by mailing a true copy thereof to its attorney, John P. Sandidge, Kentucky Home Life Building, Louisville, Kentucky. This 24 day of February, 1958.

Marshall P. Eldred

[fol. 79]

**EXHIBIT A****BROTHERHOOD OF LOCOMOTIVE FIREMEN  
AND ENGINEMEN****Louisville and Nashville Railroad System  
Office of the General Chairman****404-6 Hoffman Building  
Louisville 2, Kentucky****February 6, 1958****Mr. I. D. Britt, Lodge 937  
4253 Greenwood Street  
Birmingham 7, Alabama****Mr. L. A. DuBose, Lodge 751  
8204—9th Ave., No.  
Birmingham 6, Alabama****Mr. Jack Gunnells, Lodge 751  
6437—7th Ave., No.  
Birmingham 6, Alabama****Dear Sirs and Brothers:**

I have the following from General Chairman Ray Abner of the International Brotherhood of Firemen and Oilers under date of February 5, 1958, which is self-explanatory.

"On February 3, 1958 the case of non-operating employees in the Shop Craft Union was in Federal Court on a matter of an Injunction against the Shop Craft Unions which was granted in 1945, and which the Louisville and Nashville Railroad and a number of "scabs" are protesting that said Injunction prevented the negotiation of a Union Shop on the L. & N.

The Louisville and Nashville Railroad and the Attorney, Marshall Eldred, who was representing the [fol. 80] non-union employees, placed some twelve (12) or fourteen (14) witnesses on the Stand in behalf of the L. & N., and the non-union employees, there being some four (4) or five (5) employees from Boyles (Birming-

ham), who testified for these people. Among them was J. C. Laney, Local Chairman and legislative representative of the Brotherhood of Locomotive Engineers, also shop-men Dave Carter, Sam Jones and Sam Durant, all of whom worked during the 1955 Strike with the exception of J. C. Laney, and all of them made statements that they had been mistreated and intimidated with the exception of Laney, who stated that he did not work during the 1955 Strike, but did testify to personally seeing a number of employees performing either acts of intimidation or violence against employees who worked during the 1955 Strike.

This information is being furnished you due to the fact that it is most unusual for an Officer of a nationally recognized Union to appear as a witness in a matter that could not concern his organization. This, for your information."

This information is passed on to you as information in that no doubt our members at Birmingham would be interested to know that Local Chairman Laney appeared as a witness against the non-operating unions under these most unusual circumstances considering the fact that he is an officer of one of the operating unions.

Yours fraternally,

(s) Jake Paschall  
General Chairman

JP:nf

cc: Recording Secretaries, Lodges 937 and 751

[fol. 81]

#### IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION TO RE-OPEN—April 18, 1958

The motion of plaintiffs and interveners to reopen the case and permit the introduction into evidence on behalf of said plaintiffs and intervenors a letter dated February 6, 1958, from Jake Paschall to I. D. Britt and others is sustained and said letter may be considered in evidence subject to objections of defendants as to relevancy and

competency. The objections on the part of the defendants are hereby noted.

The defendants are directed to serve written notice on the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths; Forgers and Helpers (successor organization to the original defendant, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America) upon them and upon the Local Union defendants as follows:

Railroad Lodge No. 205 (Louisville, Ky.)  
International Association of Machinists

Lodge No. 1073 (Corbin, Ky.)  
International Association of Machinists

Subordinate Lodge No. 102 (Louisville, Ky.)  
International Brotherhood of Boilermakers, Iron Ship  
Builders and Helpers of America

Pan American No. 576 (Louisville, Ky.)  
Brotherhood Railway Carmen of America,

New Bridge Lodge No. 284 (Ravenna, Ky.)  
Brotherhood Railway Carmen of America,

Local No. 445 (Ravenna, Ky.)  
Sheetmetal Workers International Association,

[fol. 82] Local No. 1004 (Louisville, Ky.)  
International Brotherhood of Firemen, Oilers, Helpers,  
Roundhouse and Railway Shop Laborers,

Local No. 362 (Corbin, Ky.)  
International Brotherhood of Firemen, Oilers, Helpers,  
Roundhouse and Railway Shop Laborers, and

Local Union No. 1353 (Louisville, Ky.)  
International Brotherhood of Electrical Workers, or  
their successors,

Which notice shall notify said International Union and said Local Unions of the pendency of the motion to modify the injunction heretofore issued in this case on December 7,

1945. In lieu of serving notice, counsel for the moving defendants may obtain and file herein the written entries of appearance of said International Union and said Local Unions joining in said motion to modify.

Roy M. Shelbourne, United States District Judge.

April 18, 1958.

A Copy: Attest, Martin R. Glenn, Clerk, By Loraine Weller, Deputy Clerk.

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[fol. 83]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—October 10, 1959

Before: McAllister, Martin and Cecil, Circuit Judges.

This cause is argued by Richard R. Lyman for appellants and by Marshall Eldred and John P. Sandidge for appellees, and is submitted to the court.

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[fol. 84]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDGMENT—December 5, 1959

Appeal from the United States District Court for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.



[fol. 85]

## IN THE UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

No. 13,768

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SYSTEM FEDERATION No. 91, RAILWAY EMPLOYEES  
DEPARTMENT, AFL-CIO, ET AL., Appellants,

—V.—

O. V. WRIGHT, ET AL., Appellees.

Appeal from the United States District Court for the  
Western District of Kentucky, Louisville Division.

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OPINION—December 5, 1959

Before: McAllister, Chief Judge, Martin and Cecil, Cir-  
cuit Judges.

## PER CURIAM:

This is an appeal from an order denying a motion to modify an injunction. The controversy has its roots in bitter disagreements between groups of union and nonunion railroad employees, which originated in disputes arising many years ago; and it also stems from a strike, accompanied by much violence, in 1955, in which a railroad bridge was burned, and certain employees were sentenced to prison terms, for violation of, and conspiracy to violate, the Federal Train Wreck Act. See *Stanley v. United States*, 245 F. 2d 427 (C. A. 6). During the strike, many union and nonunion employees continued to work, the union employees being expelled as a result, and the nonunion employees being threatened with reprisals.

Long prior to the strike, twenty-eight nonunion employees in July, 1945, for themselves and as representatives of all nonunion employees of the Louisville and Nashville System, including approximately twenty-five hundred [fol. 86] such employees, brought an action against the railroad and certain shop craft unions seeking a declaration of rights, and an injunction. On December 7, 1945, the Dis-

strict Court, by consent and agreement of all parties to the action, entered an injunction restraining the lodges and locals of defendant unions from discriminating against the other employees, because of their failure or refusal to join the unions and further enjoining the unions from requiring that the plaintiffs and classes, represented by them, join or retain their membership in the unions as a condition of receiving promotion, leaves of absence, proper protection of seniority rights, overtime work, and any other rights or benefits which might arise out of, or be in accordance with, the regularly adopted bargaining agreements in effect between the railroad and the defendant unions. The unions were also enjoined from denying such employees promotions, pay increases, leaves of absence, seniority protection and the like, because of their failure to join or retain membership in the union. It was further provided in the decree that the District Court would retain control of the action for the purpose of entering such further orders as might be deemed necessary and proper.

Nearly twelve years after the consent decree in which the injunction was entered, the defendant unions and their successors, on July 2, 1957, filed their motion to modify the injunction, by an amendment that it have no prospective application to prohibit the unions from negotiating and enforcing any agreement authorized by an amendment to the Railway Labor Act, enacted subsequent to the entry of the injunction, which permitted the making of union security agreements, and authorized carriers and the bargaining representatives of railroad labor to provide for a union shop, with the requirement that the employees, as a condition to their continued employment, become and remain members of the union.

Answers were filed by the railroad, and on behalf of the nonunion employees, objecting to the granting of the motion to modify the injunction; and testimony was taken in court, disclosing abuse and mistreatment by union members of employees who had worked during the strike, and threats of reprisals in the future when a union shop should come into existence. The District Judge in his opinion, filed after argument of the motion to modify the injunction, [fol. 87] observed that it had been shown, without an

attempt at refutation, that bitterness and hostility, at that time, continued to exist between the union and nonunion employees, and between the unions and their employees who had worked during the 1955 strike.

The District Court held that there was continuing authority in the court to modify the prospective application of the judgment of injunction.

The court further held that, at the time of the issuance of the injunction, the Railway Labor Act made a union shop illegal, so that it was then unnecessary for the railroad and the unions to agree that nonunion members should not then be required to have membership in unions as a condition precedent to employment. When the injunction was issued, the parties therein, by their consent thereto, provided that no such requirement of union membership should thereafter be in effect in any bargaining agreement under the Act. The Amendment of 1951, subsequent to the issuance of the injunction, did no more, the court held, than make negotiations for a union shop permissive, and did not nullify the agreement or the injunction issued. It authorized a union shop by agreement, but did not require it, or require that, as a condition of employment, an employee should join or retain his membership in the bargaining union, or any union. Since, as the court said, the amendment did not require a union shop, the court, under the circumstances of the case, left the parties as they agreed to be, and to remain.

We find no error in the order of the District Court overruling appellants' motion to modify the injunction; and the order is affirmed for the reasons set forth in the opinion of Chief Judge Shelbourne. *Wright et al. v. System Federation No. 91, Railway Employees' Department, AFL-CIO et al.*, 165 F. Supp. 443.

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[fol. 88] Clerk's Certificate (omitted in printing).

• [fol. 89]

## SUPREME COURT OF THE UNITED STATES

No. 756—October Term, 1959

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SYSTEM FEDERATION No. 91, RAILWAY EMPLOYEES'  
DEPARTMENT, AFL-CIO, et al., Petitioners,

—v.—

O. V. WRIGHT, et al.

---

ORDER ALLOWING CERTIORARI—April 18, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stewart took no part in the consideration or decision of this application.

IN THE

**Supreme Court of the United States**

October Term, 1959

No. ~~258~~ 4.8

SYSTEM FEDERATION No. 91,  
RAILWAY EMPLOYEES' DEFENDING NO.  
AFL-CIO, ET AL.,

*Petitioners,*

vs.  
U. S. WOODRUFF, ET AL.,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.**

ROBERT E. HOGAN  
Kentucky Home Life Building  
Louisville, Kentucky

RICHARD R. LAMAN  
741 National Bank Building  
Toledo 4, Ohio

*Attorneys for Petitioners*

SHOEN & KRAMER  
1115 K Street, N.W.  
Washington 6, D. C.

HOLLAND, ROBE & HICKY  
1 National Bank Building  
Toledo 4, Ohio

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IN THE  
**Supreme Court of the United States**

October Term, 1959

No. ....

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SYSTEM FEDERATION No. 91,  
RAILWAY EMPLOYEES' DEPARTMENT,  
AFL-CIO, ET AL.,

*Petitioners.*

vs.

O. V. WRIGHT, ET AL.,

*Respondents.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.**

---

Petitioners herein pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on December 5, 1959.

**OPINIONS BELOW**

The opinion of the District Court is reported at 165 F. Supp. 443, and the opinion of the Court of Appeals at 272 F. (2d) 56. Both opinions are reproduced as appendices hereto, as is the original unreported consent decree of injunction (entered December 7, 1945), modification of which is sought herein.

## **JURISDICTION**

The judgment of the Court of Appeals was dated and entered December 5, 1959. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C., Section 1254 (1).

## **QUESTIONS PRESENTED**

1. Did the 1951 Amendments to the Railway Labor Act entitle statutory bargaining representatives, previously enjoined from discriminating against non-union employees, to modification of the injunction so as to permit negotiation of union security agreements expressly authorized by such amendments?

2. Were such bargaining representatives precluded from obtaining modification of the injunction by the consent nature of the original decree?

3. May a court refuse to permit negotiation of union security agreements authorized by Congress, on the basis of bitterness and hostility between union and non-union employees resulting from strike-breaking activities of the latter, and having no connection with the injunction sought to be modified?

## **STATUTE INVOLVED**

Section 2, Eleventh of the Railway Labor Act, as amended by the Act of January 10, 1951, c. 1220, 64 Stat. 1238, U.S.C. Tit. 45 Sec. 152, Eleventh:

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designat-

ed and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

“(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this

Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

“(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.”

## STATEMENT OF THE CASE

Petitioners, System Federation No. 91 of the Railway Employees' Department, AFL-CIO, and a group of affiliated international and local labor organizations, originally defendants below, seek review of a judgment affirming the District Court's denial of their motion to modify a decree of injunction entered December 7, 1945. The requested modification would remove from the scope of the injunc-



tion's prohibitions conduct which, while unlawful when the decree was entered, has subsequently been made lawful by Act of Congress.

The action originated on July 16, 1945, when O. V. Wright and twenty-seven other named plaintiffs brought suit against defendant Railroad, labor organizations representing the involved crafts or classes of its employees, and their subordinate lodges or local unions on the property of defendant Railroad, claiming that they had been subjected to unlawful discrimination in violation of the Railway Labor Act (45 U.S.C., Sec. 151 et seq.). Plaintiffs were not members of the defendant labor organizations, and the gist of the complaint (16a-40a)<sup>1</sup> was that the defendants had discriminated against non-members of the organizations in matters of promotion, seniority, overtime, leaves of absence, and other employment benefits under the applicable collective bargaining agreements, because of such non-membership. The complaint prayed for a declaratory judgment establishing the right of plaintiffs and other non-members of the defendant labor organizations, under the Railway Labor Act, to equal treatment with other employees in the enjoyment of such benefits of their employment; an injunction prohibiting defendants from future discriminations of the sort complained of; and damages of \$5,000 each for the named plaintiffs, for alleged past discrimination. (37a-40a).

Thereafter, defendants consented to a declaratory judgment and injunction, entered by the Court on December 7, 1945, (41a), purporting to declare the rights, duties and obligations of the parties under the Railway Labor Act and agreements negotiated pursuant thereto, and enjoining

<sup>1</sup>Reference is to the appendix to appellants' (petitioners here) brief in the Court of Appeals. Paging of the appendix to the Court of Appeals brief of appellees other than the Railroad Company was distinguished by appending the letter "b" to the page numbers. Any references herein to the appendices to this petition will be specifically identified.

defendants from requiring plaintiffs and the classes represented by them to join or retain membership in any of the defendant labor organizations as a condition of enjoyment of rights and benefits under the collective bargaining agreements, denying them such rights and benefits because of their failure or refusal to join or to retain their membership, or discriminating against them in the application of the bargaining agreements because of failure or refusal to join or retain such membership. The claims of the twenty-eight named plaintiffs for monetary damages were separately settled and not covered by the decree.

In the decree the Court retained control of the action for the purpose of entering such further orders as might be deemed necessary or proper. (44a).

At the time of institution of this action, and entry of the foregoing decree and injunction, the Railway Labor Act, and particularly Section 2, Fourth and Fifth thereof, made it unlawful for carriers to interfere in any way with the organization of their employees, or to coerce or compel their employees to join or remain or not to join or remain members of any labor organization, and such prohibitions were generally construed as creating an "open shop" in the railroad industry, and making unlawful closed shop, union shop or other forms of union security agreements.

However, by Act of January 10, 1951 (64 Stat. 1238; 45 U.S.C. 152, Eleventh) the Congress of the United States amended the Railway Labor Act to permit, within defined limits, the making of union security agreements by carriers subject to the Act. Negotiation, and efforts to negotiate, union security agreements pursuant to such amendment resulted in litigation challenging their legality and the constitutionality of the amendment itself, and it was not until May 21, 1956, that an authoritative ruling was obtained from this Court, in *Railway Employees' Department, AFL*

*v. Hanson*, 351 U.S. 225, upholding the validity of the amendment and agreements negotiated pursuant thereto.

Subsequently the moving defendants, and other labor organizations representing different crafts and classes of defendant Railroad's employees of the Railroad represented by them under the Railway Labor Act, upon seeking a union security agreement of the sort authorized by Section 2, Eleventh, of the Act as amended, were met with a refusal by the Railroad to negotiate such agreement or agreements for the asserted reason that it feared that to do so would subject it and the defendant labor organizations to charges of contempt for violation of the injunction of December 7, 1945.

Pursuant to notice served on counsel of record for defendant Railroad and the original plaintiffs, O. V. Wright, et al., on July 2, 1957, a motion was filed by the System Federation and affiliated international unions, appellants here, pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure, seeking modification of said decree of injunction of December 7, 1945, by adding to and incorporating therein a proviso to the effect that it should not operate to prohibit defendants, or any of them, from negotiating, entering into, or applying and enforcing, any agreement or agreements authorized by Section 2, Eleventh of the Railway Labor Act, as amended January 10, 1951. (45a-50a).

Responses opposing the requested modification of the injunction were filed on behalf of some of the original plaintiffs (61a and 74a), the defendant Railroad (66a), and additional individual employees whose intervention was allowed on February 9, 1958. (80a, 88a). Following additional hearings, entries of appearance on behalf of additional labor organization defendants, and the filing of numerous briefs (12a-15a), the District Court, under date of August 7, 1958, issued its memorandum opinion (89a; also

reproduced as Appendix B hereto), refusing to modify the injunction.

The District Court, while conceding that it had the authority to grant the requested modification of the injunction, refused to do so for the stated reason that the amendment of the Railway Labor Act, in 1951, did not constitute a sufficient change in circumstances to authorize a modification of the decree. Although stating that it was "not decisive of the question involved on the pending motion", the District Court recognized the existence of bitterness and hostility between union and non-union employees, as well as union members who had worked during a strike in 1955, as a factor in its refusal to modify the 1945 injunction. And finally, the District Court took the view that the original injunction, being a consent decree, should be construed as encompassing an agreement that in the future there would never be any requirement of union membership as a condition of employment, and that hence it would leave the parties "as they agreed to be and to remain".

In its per curiam opinion (Appendix A hereto) the Court of Appeals affirmed the order denying modification of the injunction, for the reasons set forth in the District Court's opinion. Like the District Court, it placed large emphasis (though without any showing of relevance) upon hostility and bitterness attending strikebreaking activities in the 1955 strike. And it similarly construed the consent decree of injunction as a contract, saying "the parties therein, by their consent thereto, provided that no such requirement of union membership should thereafter be in effect in any bargaining agreement under the Act".

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Western District of Kentucky, was alleged by the original plaintiffs to be "the Act of Congress of June 21, 1934,<sup>2</sup> 48

<sup>2</sup>The Railway Labor Act.

Stat. 1185, 45 U.S.C.A., ch. 8, being an act to regulate interstate commerce; 28 U.S.C.A., sec. 41 (8); Federal Rule of Procedure, Rule 57, 28 U.S.C.A., sec. 723; 28 U.S.C.A., sec. 400". (20a)

## REASONS FOR GRANTING THE WRIT

1. **This case presents an important question of federal law which has not been, but should be settled by this Court.**

Nine years ago the Congress of the United States, in enacting Section 2, Eleventh, of the Railway Labor Act (45 U.S.C., Sec. 152 Eleventh) provided that labor organizations representing employees in the railroad industry "shall be permitted" to negotiate union security agreements. After much litigation the validity of that enactment was established by this Court in *Railway Employees' Department, A.F.L., v. Hanson*, 351 U.S. 225. Yet today representatives of the entire shop-craft group of employees of one of the nation's largest Class I Railroads<sup>3</sup> stand perpetually enjoined, in the light of the decisions below, from seeking the benefits of union security agreements. The effect of the denial of the requested modification of the 1945 injunction is to maintain an everlasting prohibition against what Congress has said shall be permitted; to perpetuate a restraint against conduct now and for the last nine years completely lawful; to maintain in effect a remedy for a right which has become non-existent; and to subject labor organizations to the injunctive processes of the

<sup>3</sup>On March 1, 1957, the Interstate Commerce Commission, in *Finance Dock et No. 18845, Louisville & Nashville Railroad Company, et al., Merger, etc.*, approved the acquisition of the properties of the Nashville, Chattanooga & St. Louis Railway by the Louisville and Nashville Railroad Company through a merger of the two railroads. (295 I.C.C. 457).



~~federal courts long after the withdrawal of jurisdiction to grant such an injunction.<sup>4</sup>~~

Prior to 1951 there were a number of instances in which injunctions were issued to compel compliance by statutory bargaining representatives in the railroad industry with the principles enunciated by this Court in 1944 in *Steele v. Louisville & Nashville Railroad Company*, 323 U. S. 192, and *Tunstall v. Brotherhood of Locomotive F. & E.*, 323 U. S. 210.<sup>5</sup> Should the decision below be permitted to stand, they will furnish a basis for depriving numerous organizations, representing employees in various crafts on many railroads, of the benefits of union security agreements. The likelihood of such a development is testified to by the multitude of suits since 1951 involving other aspects of union security agreements in the railroad industry.

Although the specific question of the effect of the 1951 amendments to the Railway Labor Act upon such previously issued injunctions, and the right to obtain modification thereof to conform to the change in the parties' rights and obligations under the statute, has not been passed on by this Court, it is clear that the decisions below are plainly in conflict with basic principles governing injunctions and their modification.

The decree that was entered in 1945 was a judgment defining the then existing rights and obligations of the par-

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<sup>4</sup>The trial court's jurisdiction to grant the 1945 injunction depended solely on the Railway Labor Act. It is elementary that jurisdiction could not be conferred by the consent nature of the decree, or any agreement of the parties. In *Graham v. Brotherhood of L. F. & E.*, 338 U.S. 232, this Court made it clear that the Norris-LaGuardia Act (29 U.S.C., Sec. 101 et seq.) is avoided only when the court is called upon "to compel compliance with positive mandates of the Railway Labor Act" (p. 237). Clearly, in view of the 1951 amendments to the Railway Labor Act, there would be no jurisdiction in a federal court to enjoin union security agreements which the amendments say shall be permitted.

<sup>5</sup>Examination of Appendix C hereto will reveal that these cases supplied the pattern for the delineation of statutory rights and obligations set forth in the December 7, 1945, consent decree of injunction herein.



ties under the Railway Labor Act, and enjoining observance of those statutory duties. Those matters are of course subject to legislative change, and it may not be assumed from the consent nature of the decree that the parties or the court contemplated the establishment in perpetuity of a set of jural relationships independent of and immune from future legislative action.

The holding of the court below that a change in the statute did not justify a *pro tanto* modification of the injunction, removing from the scope of its protection rights which had ceased to exist, is inconsistent with one of the most basic principles to be considered in these cases — i.e., that an injunction is simply a remedy for the protection of a legal right, but is not the *source* of the right.

“An injunction decree *does not create a right*; it is a remedy protective of a right; a party obtaining the injunction *does not obtain a vested right*; and accordingly its *prospective* features are subject to vacation or modification when warranted by equitable principles, whether the decree was entered in a contested case, as the result of a default, or by consent of the parties.” (Moore’s Federal Practice, Second Edition, Vol. 7, p. 285-286.)

From this basic concept, it logically follows that when the legal right which formed the basis for the injunction is changed or terminated, the injunction should be accordingly modified or vacated, insofar as its future application is concerned. Otherwise we would be faced with the situation of a continuing remedy for the protection of a non-existent right.

What is sought, of course, is simply the removal, from the scope of the December 7, 1945, injunction, of any prohibition against the negotiation and application of a union security agreement or agreements, as authorized by the

1951 amendments to the Railway Labor Act. Should the injunction be so modified, and should defendant Railroad enter into such an agreement with the labor organizations representing the involved crafts of its employees, then the plaintiffs and other employees in those crafts would be required, as a condition of continued employment, to become members of the labor organization representing their craft, "*Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.*" (Railway Labor Act, Sec. 2 Eleventh (a) ; emphasis supplied.)

The proposed modification would *not* vacate or terminate the injunction, but would only remove the prohibition indicated.

It would *not* affect the basic prohibitions against the kind of alleged discriminations which prompted the institution of this action in 1945—i.e., hostile discrimination against particular employees or groups of employees with respect to promotion, seniority, overtime, and other rights and benefits under the collective bargaining agreements.

Being simply the removal of a prohibition, the modification would *not* operate to decide any future questions that might be raised concerning the validity of particular union security agreements that may be negotiated, authority to negotiate them, their proper interpretation and application, or questions of the interpretation and validity of the 1951 amendments to the Railway Labor Act itself. De-

fendant Railroad and its employees would be left free to raise such questions or disputes unhampered by the requested modification.

Specifically, the motion to modify the injunction was filed under Rule 60 (b) (5) of the Federal Rules of Civil Procedure, which provides in part as follows:

*"Rule 60. Relief From Judgment or Order.*

*"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; . . . "* (Emphasis supplied.)

Even without the authority thus expressly provided, it is well established that as a matter of general equity principles injunctions having continuing effect are subject to being vacated or modified, insofar as their future application is concerned, to conform to changed circumstances. As Professor Moore states, in discussing the effect of the present Rule 60 (b):

*"Prior to the Federal Rules it was settled that a court of equity had power to vacate or modify a final decree that had prospective application where it was no longer equitable that the decree should have such prospective effect. As Justice Cardozo stated in United States v. Swift & Co. a 'continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.' This could be justified on inherent power, on principles underlying a bill of review, or on a combination of these principles. Except insofar as principles underlying a bill*

of review would support relief, the first saving clause of original Rule 60 (b) was inept in preserving the power; but since the power was clearly rooted in practical good sense courts continued to exercise it under Rule 60 (b). And amended Rule 60 (b) now states that one of the reasons for granting relief from a final judgment is that 'it is no longer equitable that the judgment should have prospective application' ". (Moore's Federal Practice, Second Edition, Vol. 7, p. 90-91.)

Although in this case the trial court's decree of December 7, 1945, reserved continuing control of the action, power to modify the decree would be present even without such reservation. As stated in *United States v. Swift & Co.*, 286 U.S. 106, 114:

"Power to modify the decree was reserved by its very terms, . . . If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."

As we have pointed out, the modification sought here relates strictly to the prospective application of the injunction, and as such was clearly within the power of the court under the Rule invoked as well as accepted principles of equity jurisprudence.

The purpose of the original injunction was to protect rights which plaintiffs enjoyed by virtue of the Railway Labor Act. The statute was the sole source of those rights. Modification of the injunction to conform the scope of its protection to the scope of plaintiffs' continuing statutory rights thus does not thwart, but continues to effectuate, the only purpose of the original decree.

While it is generally said that the granting or denial of a motion to modify or dissolve an injunction rests within the discretion of the trial court, and its action will not be disturbed on appeal absent an abuse of that discretion, the

rule is different where, as here, there is no dispute as to the facts and the ruling involved only questions of law and their application to the conceded facts. Here there was no factual issue for the District Court to resolve, and no question of burden of proof, since appellants' motion was predicated entirely upon the amendment of the controlling statute, the Railway Labor Act. As stated at 28 Am. Jur., Injunctions, Sec. 328, p. 501:

"... If the facts are such that solely questions of law are presented, the trial court's action is reviewable, and should be reviewed on appeal. *Differently stated, the trial court abuses its discretion where it fails or refuses to properly apply the law to conceded or undisputed facts.* A proper discretion does not include the misapplication of the law to the facts, and where that is the case, the order appealed from will be reversed." (Emphasis supplied.)

**2. The decision of the Court of Appeals is in conflict with applicable decisions of this Court and of other Courts of Appeals.**

In construing the consent decree of injunction as a contract, and denying modification for that reason, the decision below is in clear conflict with decisions of this Court and other Courts of Appeals. A similar conflict is presented by the refusal of the Courts below<sup>6</sup> to recognize a change in the governing statute as a basis for modification, and their concomitant reliance upon factual elements unrelated to the controlling question of whether plaintiffs any longer were legally entitled to have union security agreements prohibited.

It is clear that the court's authority to modify the injunction was unimpaired by the fact that it was entered

<sup>6</sup>The opinion of the Court of Appeals, in addition to the reasoning set forth therein, expressly adopts the reasoning of the District Court as the basis for affirmance.

by consent of the parties. This was squarely and unequivocally stated by this Court in *United States v. Swift & Co.*, 286 U. S. 106, as follows:

"... The result is all one whether the decree has been entered after litigation or by consent (*American Press. Assoc. v. United States*, L.R.A. 1918A, 1039, 157 C.C.A. 387, 245 Fed. 91). In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. *We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act.* A different view would not help them, for they were not parties to the contract, if any there was. All the parties to the consent decree concede the jurisdiction of the court to change it. The interveners gain nothing from the fact that the decree was a contract as to others, if it was not one as to them. But in truth what was then adjudged was not a contract as to any one. *The consent is to be read as directed towards events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.*" (Emphasis supplied.)

In *Coca-Cola Co. v. Standard Bottling Co.*, 138 F. (2d) 788, the Court of Appeals for the Tenth Circuit stated:

"We know of no case which holds that a consent decree imposing a continuing injunction deprives the court of its supervisory jurisdiction in the matter."

See also *Chrysler Corp. v. United States*, 316 U.S. 556, at 567.

Following the lead of the District Court, the Court of Appeals below said:

"When the injunction was issued, the parties



therein, by their consent thereto, provided that no such requirement of union membership should thereafter be in effect in any bargaining agreement under the Act."

Aside from the fact, as we have pointed out, that no agreement of the parties could support jurisdiction to grant the injunction, it is clear that the court below erred in construing the consent decree as a contract rather than a judicial act.<sup>7</sup> If the act of consenting to the entry of a decree of injunction were to be accorded the effect thus attached to it by the courts below, then all consent decrees would necessarily be immune from modification. But as this Court recognized in the *Swift & Co.* case, quoted *supra*, such is not the law, and a consent decree is not "an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be".

As noted in our discussion of basic principles applicable to the modification of injunctions, the courts below clearly erred in refusing to recognize the amendment of the Railway Labor Act as sufficient ground for the requested modification.

Such refusal is clearly in conflict with the decision of this Court in *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, which recognizes a change in the law as sufficient basis for modification of an injunction.

The Court of Appeals for the Seventh Circuit similarly recognized that "the injunction will be vacated or modified where the law has been changed making acts en-

<sup>7</sup>Although perusal of the District Court's opinion might indicate that the court thought that in addition to the consent decree, there was a separate, "side" agreement not to ever negotiate for a union shop, the Court will search the record in vain for any evidence of the existence of such a contract. The only "agreement" was the simple act of consenting to the entry of the decree of injunction of December 7, 1945.

joined legal". *Western Union Tel. Co. v. International Brotherhood, etc.*, 133 F. (2d) 955, 957.

One of the leading cases pertinent to our discussion, and which was cited by this Court as authority for its decision in *United States v. Swift & Co.*, 286 U.S. 106, is *Ladner v. Siegel*, 298 Pa. 487, 147 Atl. 699, 68 A.L.R. 1172.

There the court specifically listed a change in the law, either statutory or common, as one of the bases for modification of an injunction, and emphasized the point that injunctions do not create rights, saying:

"The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, and (b) where the law, common or statutory has changed, been modified or extended, and (c) where there is a change in the controlling facts on which the injunction rested.

"... An injunction decree does not create a right; it protects the rights of the owner to the enjoyment of his property from injurious interference by the uses of other land. The right protected is an attribute of property existing through the application of common-law principles. *A decree preventing its injury does not give to the complaining party a perpetual or vested right either in the remedy, the law governing the order, or the effect of it.* He is not entitled to the same measure of protection at all times and under all circumstances. A decree protecting a property right is given subject to the rules governing modification, suspension, or dissolution of an injunction. The decree is an ambulatory one, and marches along with time affected by the nature of the proceeding." (Emphasis supplied.)

Another leading case, involving modification of an injunction to conform to a change in the law upon which it

was based, is *Santa Rita Oil Co. v. State Board of Equalization*, 112 Mont. 359, 116 P. (2d) 1012, 136 A.L.R. 757. There the court modified an injunction to conform to a change in judicial law, resulting from this Court's overruling of its earlier precedents. The following language from the court's decision is particularly relevant here. Following extensive quotation from *Ladner v. Siegel*, *supra*, the court said:

"This rule is well established and many of the leading authorities will be found in the note in ALR above referred to and in 28 Am. Jur. p. 494, § 323. Among the leading cases are *United States v. Swift & Co.*, 286 U.S. 106, 52 S. Ct. 460, 462, 76 L. Ed. 999, in which the court said that by granting a permanent injunction, 'court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong;' *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, 557, 85 L. Ed. 836, 132 ALR 1200, in which the court said: 'The injunction which we sustain is "permanent" only for the temporary period for which it may last . . . Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted;' and *Glenn v. Field Packing Co.* 290 U.S. 177, 54 S. Ct. 138, 78 L. Ed. 252, in which the court held that a modification is warranted by a change in the law by judicial decision. The latter point hardly requires citation of authority, for obviously it is not equitable to continue to restrain a party from actions no longer unlawful whether the change in law has come about through new legislative enactment or through an authoritative change in judicial construction by the courts. However the change may have come about, it is obviously not within the theory of a government of uniform laws conferring equal rights on all, as distinguished from a government of men conferring unequal privileges on some, that the state authorities should be further prevented from the enforcement of tax laws against this

taxpayer and not against others similarly situated

"... Thus an adjudication that plaintiff was then entitled under the existing laws and facts to an injunction does not amount to an adjudication that it will always be entitled to it, regardless of changing circumstances or laws nor does it tie the hands of the equity court so as to prevent it from doing equity in the future. In other words, to say that the question may not be reopened for the purpose of determining whether the injunction should have been granted in the first instance is not to say that it may not be reopened for the determination of the question whether equity now demands that the injunction be modified, vacated, or continued further . . ."

Additional authorities supporting modification of an injunction to conform to a subsequent change in the law are discussed in the annotation following the *Santa Rita Oil Co.* case, at 136 A.L.R. 765. See also the recent Kentucky decision in *National Electric Service Corporation v. D. 50 United Mineworkers*, 279 S.W. (2d) 308 (1955) where the court construed Kentucky's Civil Rule 60.02, which is the same as Rule 60 (b) of the Federal Rules, and set aside a judgment creating a permanent injunction because of a subsequent change in the law, saying:

"Secondly, in addition to the authority of the above subsection of CR 60.02, the trial court may well have acted under an established principle governing injunctions. An injunction, whether permanent or temporary, is an equitable process that results only from the extraordinary powers of the chancellor, and is a continuing process over which the equity court necessarily retains jurisdiction in order to do equity. This includes power to modify or vacate it, if the law has changed or present considerations of equity demand it. See *Santa Rita Oil Co. v. State Board of Equalization*, 112 Mont. 359, 116 P. 2d 1012, 136 ALR 757; and the cases assembled in annotation in 136 ALR; *United*

*States v. Swift*, 286 U. S. 106, 52 S. Ct. 460, 75 L. Ed. 999; *Ladner v. Siegel*, 298 Pa. 487, 148 A. 699, 68 ALR 1172.

"The injunction, as such, serves to protect the status quo in respect to property rights under existing law and facts. *Kelly v. Earle*, 325 Pa. 337, 190 A. 140. A change in either serves as sufficient ground for modification or vacation of the original judgment—not by reason of the void or voidable aspect of the original decree—but through the chancellor's inherent power to correct that which it is no longer equitable to enforce.

"In the case at bar, the trial court stated in its opinion the injunction was issued on the sole ground that the picketing had the unlawful purpose of coercing the employer to compel its eligible employees to become members of the union. The Garner case removed the power to use an injunction based on that ground. The Chancellor, in exercise of his inherent power, was well within his right and duty in setting aside the injunction because of the subsequent change in law." (Emphasis supplied.)

In refusing to modify the 1945 injunction, the courts below commented that the 1951 amendments to the Railway Labor Act were only "permissive", in that they did not require union security agreements, and apparently concluded therefrom that the change in the law left it optional with the courts whether to continue the injunctive prohibition of such agreements.

There has, of course, never been any question here of asking the court to require the execution of a union shop agreement. But the amendments of the Act very definitely removed a pre-existing statutory prohibition, and modification of the injunction is here sought to conform to that change in the statute.

The language used by Congress was positive. It stated that union shop agreements of the type described "shall be permitted . . . . Notwithstanding any other provision of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State". When Congress says something "shall be permitted", we think it is clear that the intent is that it shall not be prohibited. The plain import and effect of the statutory amendment was to make union security agreements lawful, as a matter of uniform national policy under the Railway Labor Act.

Having erroneously decided that this change in the law was insufficient to justify modification of the injunction, the courts below relied upon evidence of hostility and bitterness arising out of a 1955 strike as supporting the conclusion that there had been no change in the circumstances giving rise to the injunction which would support modification.

The irrelevance of this situation to the motion to modify is readily apparent. The lengthy testimony taken showed that it had nothing to do with this case, or discrimination in job rights because of membership or non-membership in any of the defendant labor organizations. It was instead the aftermath of an economic strike, and the hostility, bitterness and antipathy lay between those who went out on strike, and those who remained at work during the strike, irrespective of whether the latter were members or non-members of the organizations. In view of the safeguards provided in Section 2, Eleventh, of the Act, the fact that the labor organizations fined or expelled disloyal members for their refusal to support the strike constitutes no objection to a removal of the injunction's prohibition against negotiation of union security agreements pursuant to that section.

Summing up, we have in this case a judgment based



solely on plaintiffs' rights under the Railway Labor Act as it was in 1945 with a declaration as to what those rights were and an injunction protecting them. The act is now changed, with respect to the subject matter of the pending motion to modify the injunction. In its original form the injunction protects rights no longer in existence, and its enforcement would mete out punishment for acts no longer unlawful, but expressly authorized by Act of Congress.

We submit that it is inequitable to continue the prospective application of a decree protecting plaintiffs in matters in which they no longer have any substantive legal right to protection, and prohibiting defendants, under pain of contempt proceedings, from conduct in which they have an express, affirmative statutory right to engage.

The courts below clearly erred in holding, contrary to the decision of this and other courts, that the change in the law with which we are here concerned would not support modification of the injunction in the absence of some other change in the "facts". We can conceive of no change more basic, or compelling of a modification of an injunction in its future application, than a change in the law which completely undercuts the source of the right previously protected. When the injunction was issued, railroad union security agreements were prohibited by statute. Today they are expressly approved, the statute as amended stating that they "*shall be permitted*", and they could not now be enjoined. No change in the factual relationships of the parties could be as decisive.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. HOGAN  
Kentucky Home Life Building  
Louisville, Kentucky

RICHARD R. LYMAN  
741 National Bank Building  
Toledo 4, Ohio

*Attorneys for Petitioners:*

*Of Counsel:*

SCHOENE & KRAMER  
165 K. Street, N.W.  
Washington 6, D. C.

MULHOLLAND, ROBIE & HICKEY  
741 National Bank Building  
Toledo 4, Ohio

System Federation No. 91,  
Railway Employees' Department,  
AFL-CIO

International Association of  
Machinists

Sheet Metal Workers' International  
Association

Brotherhood Railway Carmen of  
America

International Brotherhood of  
Electrical Workers

**International Brotherhood of  
Firemen, Oilers, Helpers,  
Roundhouse and Railway Shop  
Laborers**

**International Brotherhood of  
Boilermakers, Iron Ship Builders,  
Blacksmiths, Forgers and Helpers  
Railroad Lodge No. 205 (Louisville,  
Ky.)**

**International Association of  
Machinists  
Lodge No. 1073 (Corbin, Ky.)**

**International Association of  
Machinists  
Subordinate Lodge No. 102  
(Louisville, Kentucky)**

**International Brotherhood of  
Boilermakers, Iron Ship Builders  
and Helpers of America**

**Pan American No. 576 (Louisville,  
Ky.)**

**New Bridge Lodge No. 284 (Ravenna,  
Ky.)**

**Brotherhood Railway Carmen of  
America**

**Local No. 445 (Ravenna, Ky.)**

**Sheet Metal Workers' International  
Association**

**Local No. 1004 (Louisville, Ky.)**

**International Brotherhood of  
Firemen, Oilers, Helpers, Round-  
house and Railway Shop Laborers;**

**Local No. 362 (Corbin, Ky.)**

**International Brotherhood of Fire-  
men, Oilers, Helpers, Roundhouse  
and Railway Shop Laborers; and**

**Local Union No. 1353 (Louisville,  
Ky.)**

**International Brotherhood of  
Electrical Workers Or Their  
Successors.**

APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE  
BUREAU OF PLANT INDUSTRY

# APPENDIX

The following is a list of the plants which are grown in the United States and which are of commercial importance. The list is arranged in alphabetical order of the names of the plants. The names of the plants are given in full, and the names of the States in which they are grown are given in parentheses. The list is given in full, and the names of the States in which they are grown are given in parentheses.

**APPENDIX A**

NO. 13,768.

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**SYSTEM FEDERATION No. 91, RAILWAY EMPLOYEES  
DEPARTMENT, AFL-CIO, ET AL.,**

*Appellants,*

**v.**

**O. V. WRIGHT, ET AL.,**

*Appellees.*

**Appeal from the United States District Court for the  
Western District of Kentucky, Louisville Division.**

**Decided December 5, 1959.**

**Before: McALLISTER, Chief Judge, MARTIN and CECIL,  
Circuit Judges.**

**PER CURIAM.** This is an appeal from an order denying a motion to modify an injunction. The controversy has its roots in bitter disagreements between groups of union and nonunion railroad employees, which originated in disputes arising many years ago; and it also stems from a strike, accompanied by much violence, in 1955, in which a railroad bridge was burned, and certain employees were sentenced to prison terms, for violation of, and conspiracy to violate, the Federal Train Wreck Act. See *Stanley v. United States*, 245 F. 2d 427 (C. A. 6). During the strike, many union and nonunion employees continued to work, the union employees being expelled as a result, and the nonunion employees being threatened with reprisals.

Long prior to the strike, twenty-eight nonunion employees in July, 1945, for themselves and as representatives of all nonunion employees of the Louisville and Nashville System, including approximately twenty-five hundred such employees, brought an action against the railroad and certain shop craft unions seeking a declaration of rights, and an injunction. On December 7, 1945, the District Court, by consent and agreement of all parties to the action, entered an injunction restraining the lodges and locals of defendant unions from discriminating against the other employees, because of their failure or refusal to join the unions and further enjoining the unions from requiring that the plaintiffs and classes, represented by them, join or retain their membership in the unions as a condition of receiving promotion, leaves of absence, proper protection of seniority rights, overtime work, and any other rights or benefits which might arise out of, or be in accordance with, the regularly adopted bargaining agreements in effect between the railroad and the defendant unions. The unions were also enjoined from denying such employees promotions, pay increases, leaves of absence, seniority protection and the like, because of their failure to join or retain membership in the union. It was further provided in the decree that the District Court would retain control of the action for the purpose of entering such further orders as might be deemed necessary and proper.

Nearly twelve years after the consent decree in which the injunction was entered, the defendant unions and their successors, on July 2, 1957, filed their motion to modify the injunction, by an amendment that it have no prospective application to prohibit the unions from negotiating and enforcing any agreement authorized by an amendment to the Railway Labor Act, enacted subsequent to the entry of the injunction, which permitted the making of union security agreements, and authorized carriers and the



bargaining representatives of railroad labor to provide for a union shop, with the requirement that the employees, as a condition to their continued employment, become and remain members of the union.

Answers were filed by the railroad, and on behalf of the nonunion employees, objecting to the granting of the motion to modify the injunction; and testimony was taken in court, disclosing abuse and mistreatment by union members of employees who had worked during the strike, and threats of reprisals in the future when a union shop should come into existence. The District Judge in his opinion, filed after argument of the motion to modify the injunction, observed that it had been shown, without an attempt at refutation, that bitterness and hostility, at that time, continued to exist between the union and nonunion employees, and between the unions and their employees who had worked during the 1955 strike.

The District Court held that there was continuing authority in the court to modify the prospective application of the judgment of injunction.

The court further held that, at the time of the issuance of the injunction, the Railway Labor Act made a union shop illegal, so that it was then unnecessary for the railroad and the unions to agree that nonunion members should not then be required to have membership in unions as a condition precedent to employment. When the injunction was issued, the parties therein, by their consent thereto, provided that no such requirement of union membership should thereafter be in effect in any bargaining agreement under the Act. The Amendment of 1951, subsequent to the issuance of the injunction, did no more, the court held, than make negotiations for a union shop permissive, and did not nullify the agreement or the injunction issued. It authorized a union shop by agreement, but did not require

it, or require that, as a condition of employment, an employee should join or retain his membership in, the bargaining union, or any union. Since, as the court said, the amendment did not require a union shop, the court, under the circumstances of the case, left the parties as they agreed to be, and to remain.

We find no error in the order of the District Court overruling appellants' motion to modify the injunction; and the order is affirmed for the reasons set forth in the opinion of Chief Judge Shelbourne. *Wright et al. v. System Federation No. 91, Railway Employees' Department, AFL-CIO et al.*, 165 F. Supp. 443.

**APPENDIX B**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

Civil Action No. 942

O. V. WRIGHT, ET AL.,

*Plaintiffs,*

vs.

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES'  
DEPARTMENT, AFL-CIO, ET AL.,

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

*Defendants.*

**MEMORANDUM — Dated  
August 7, 1958.**

In July, 1945, twenty-eight non-union employees of the Louisville & Nashville Railroad Company, for themselves and representing all non-union employees upon the Louisville & Nashville System, instituted an action against that railroad company and certain shop craft unions, seeking a declaration of rights and an injunction.

The plaintiffs alleged that the railroad and the unions

had discriminated against the class of employees represented by plaintiffs in granting promotions, overtime work, and other privileges and benefits and had, in violation of plaintiffs' seniority rights, preferred members of the unions in their employment relationship because the plaintiffs and the class represented by them had refused to join or maintain membership in the unions.

That proceeding in this Court culminated, on December 7, 1945, in the entry of a judgment "by consent and agreement of all the parties." That judgment is as follows:

"By consent and agreement of all the parties to this action, it is ordered, adjudged and decreed as follows:

"That the defendants, other than the defendant Railroad, and all of the subordinate lodges and locals of the defendant Unions, acting as the duly designated and authorized representatives of any employees of defendant Railroad, are, in accordance with the provisions of the Railway Labor Act and in accordance with the duly adopted bargaining agreements between the defendant Railroad and defendant Unions, under the obligation and duty to represent and treat fairly and impartially, and without discrimination based on membership or non-membership in any labor organization, all members of the crafts or classes of boilermakers, machinists, carmen, sheet metal workers, electricians, power house employees and railway shop laborers, including plaintiffs to this action, without regard to whether said employees, or any of them, are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization;

"That the defendant Railroad, in accordance with the Provisions of the Railway Labor Act and in accordance with the duly adopted bargaining agreements between the said Railroad and the defendant Unions, is under the duty and obligation to refrain from discrimination against its employees in the crafts or classes of boilermakers, machinists, carmen, sheet-metal workers, electricians, power house employees and railway shop laborers, including the plaintiffs in this action, because of or by reason of the failure or refusal of said employees to join or retain their membership in any of the defendant labor organizations, or in any labor organization;

"That the plaintiffs in this action and all other employes of the defendant Railroad, employed in the boilermakers, machinists, carmen, sheet metal workers, electricians, power house employes and railway shop laborers crafts or classes, who are not members of the defendant labor organizations, or any subordinate lodge or local thereof, shall from and after the date hereof and in accordance with the collective bargaining agreements, be entitled, irrespective and without regard to whether said employes, or any of them, are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization, to the rights of promotion to preferred jobs, to jobs in a higher classification paying a higher rate of pay, to proper protection of seniority, to bid on or be assigned to vacancies, to leaves of absence with proper protection of seniority and to their proper share of overtime work and compensation therefor, as provided for in such agreements now in effect or that may hereafter be in effect in accordance with the Railway Labor Act;

"That all of the defendants, and all of the sub-

ordinate lodges and locals of the defendant Unions acting as the duly and authorized representatives of any employes of defendant Railroad, their officers, agents, employes and members, and the defendant Railroad, be and they are hereby enjoined from requiring that the plaintiffs and the classes represented by them in this action join or retain their membership in any of said defendant labor organizations, or any labor organization, as a condition to receiving promotion, leaves of absence, proper protection of seniority, overtime work and any other rights or benefits which may arise out of or be in accordance with the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the Railway Labor Act; and are enjoined from denying to said plaintiffs, or the classes represented by them in this action, promotion to such preferred jobs, jobs in a higher classification with a higher rate of pay, leaves of absence, proper protection of seniority, overtime work or any other right or benefit arising out of or in accordance with the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, for the sole and only reason that the plaintiffs or classes represented by them in this action, are not members or refuse to join or to retain their membership in any of said defendant labor organizations, or any labor organization; and they are further enjoined, in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between



the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of the defendant labor organizations, or any labor organization;

"That one-half the costs of this action be paid by defendant Railroad and the other half thereof be paid by the defendant Unions.

"The Court retains control of this action for the purpose of entering such further orders as may be deemed necessary or proper."

In the case of System Federation No. 91 v. Reed, 180 F. 2d 991, at page 998, the Court of Appeals for the Sixth Circuit declared this judgment should be considered as a judgment in a true class action "and res adjudicata of the rights of all of the members of the class represented by the parties plaintiff therein."

July 2, 1957, the defendant unions and their successors filed in this action their motion to modify the injunctive phase of the judgment of December 7, 1945. The amendment sought was to provide that the injunction should have no prospective application to prohibit the defendant unions and the railroad from negotiating, entering into, or applying and enforcing any agreement or agreements authorized by Section 2, Eleventh, of the Railway Labor Act as amended January 10, 1951.

It was alleged in the motion that, at the time the original complaint in this case was filed and at the time the judgment was entered, the Railway Labor Act, par-

ticularly Section 2, Fourth and Fifth thereof, made it unlawful for carriers to interfere in any way with the organization of their employees or to coerce or compel their employees to join or remain, or not to join or remain, members of any labor organization.

It was further alleged that the amendment to the Railway Labor Act of January 10, 1951, and now constituting Section 152, Eleventh, of Title 45, United States Code, permitted the making of union security agreements as limited by that amendment, and authorized carriers and bargaining representatives of railway labor to provide for a union shop; that the unions here involved were currently seeking to negotiate an agreement with the railroad requiring the employees, as a condition to their continued employment, to become and remain members of the labor organizations representing their respective crafts; but, that the defendant railroad had refused to negotiate for such an agreement for the asserted reason that it would subject itself and such labor organizations to charges of contempt for violation of the injunctive phases of the judgment entered herein December 7, 1945.

It was alleged that the 1951 amendment to the Railway Labor Act terminated the rights of the non-union employees to be free from the requirements of union security agreements, and it was further alleged that it was no longer equitable that the injunction should have prospective application by prohibiting the defendant unions and the railroad from negotiating such union shop agreements.

The railroad filed a motion for an extension of time in which to file its response in the present proceedings to a date after the defendant unions should have given notice to individual members of the classes and crafts involved, alleging that some 2,500 of its employees in said classes and crafts did not belong to any labor organiza-

tion, all and each of whom had rights adjudged to them in the decree of December 7, 1945, which entitled them to notice of the unions' motion. Such an order was entered, requiring that all persons whose rights might be affected by a modification of the injunction should be given notice of a hearing not less than 20 days prior to the date set for the hearing.

Five of the original plaintiffs in the complaint filed in 1945, for themselves and all non-union employees of the defendant railroad in the machinists, carmen, sheet metal workers, electricians, boilermakers and firemen, oilers, helpers, and laborers crafts, filed a response alleging:

(1) That the movant unions were without authority on behalf of the employees to negotiate for a union shop for the reason that the unions were selected as bargaining representatives for the various crafts under the provisions of the Railway Labor Act prior to January 10, 1951, the effective date of the Railway Labor Act amendment, and at a time when the Railway Labor Act did not authorize or permit the bargaining representatives of employees to negotiate for a union shop;

(2) That, in the action filed by them in 1945, monetary damages in the amount of \$5,000.00 each was sought to be recovered by the 28 plaintiffs; that in agreeing to the said decree the 28 plaintiffs surrendered their right to their claims for monetary damages, except to be paid, collectively, a total of \$5,000; that, having surrendered that claim for damages in partial exchange for the judgment providing a declaration of rights and injunction, it would be inequitable to permit the unions to now negotiate for a union shop;

(3) That there had been no change in the factual situation surrounding the parties and the employment of

the plaintiffs and the classes represented by them which would warrant or justify a modification of the injunction; that the change effected by the amendment to the Railway Labor Act was neither directory nor mandatory, but permissive only, and the Court would not be authorized to modify the injunction, absent the change in factual situation, and

(4) Finally, the decree or judgment of injunction has not been used as an instrument of wrong or oppression; but, a modification of that decree would make it possible for the unions, through economic pressure or strike, to compel the institution of a union shop and thereby compel all of the employees of the railroad to join and retain membership in a labor union in order to obtain and maintain rights and benefits of employment on the railroad, and would thereby set for nought and nullify the judgment entered by agreement of all the parties to the prejudice of all non-union employees of the railroad.

By amendment to plaintiffs' response, it was alleged that there existed a feeling of hostility, bitterness and resentment on the part of the railroad's employees who were members of the defendant unions toward the employees who were non-members of the unions; that this hostility and bitterness had been greatly enhanced as a result of a 58-day strike which occurred on the railroad in 1955. It was alleged that during said strike union and non-union employees worked, and that those who belonged to the unions and who worked during the strike were either expelled from the unions or voluntarily relinquished their membership therein; that following the termination of the strike the union employees displayed a hostile attitude toward all employees who had worked during the strike and subjected said employees to all manner of indignities in order to force them to relinquish their employment, and that this feeling of hostility continued. It

was alleged that should the modification of the injunction be granted a union shop would be established and the non-union employees would be compelled to join the unions and, after they were subject to the unions' discipline, they would be further discriminated against and punished for their failure to voluntarily seek and maintain membership in the unions and for their failure to cease work during the period of the strike.

Testimony was heard by the Court on February 3 and 4, 1958, and, at the request of counsel, time was granted for the filing of briefs. Counsel for the unions, for the railroad, and for the non-union employees have filed extensive briefs showing intensive study, all of which have been most helpful to the Court.

The question for decision, as stated by counsel for the unions, is "should an injunction be modified, in its prospective application, when the law upon which it was based is subsequently changed so as to expressly authorize conduct which was previously forbidden."

Authority for modification of the judgment and injunction is referred to as Rule 60 (b) (5) of the Federal Rules of Civil Procedure. The pertinent portion of which rule is,

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; . . ."

The railroad and non-union employees insist that, un-

der the law applicable to this case, a change of law alone is not compelling and, in fact, would not authorize the modification in the absence of change in the facts or circumstances, citing *Thompson v. Maxwell*, 95 U.S. 391; *United States v. Swift & Company*, 286 U. S. 106; *Western Union v. International Brotherhood*, (CA 7) 133 F. 2d 955; *Pacific Tel. & Tel. Company v. Henneford*, 199 Wash. 462, 92 P. 2d 214; *Degenhart v. Harford*, 18 N.E. 2d 990.

The unions, conceding *arguendo* that a change in facts as well as law is a part of the burden of proof devolved upon them in seeking the modification, say that no more basic or compelling change in facts could exist than the change in the law which completely undercuts the source of the rights protected by the injunction. They argue that when the injunction was issued railroad security agreements (union shops) were prohibited by statute and today they are expressly approved, and that the express provision of the statute that such agreements "shall be permitted" shows a change in factual relationships than which none could be more decisive.

We adopt for discussion the following outline contained in the brief of counsel for the unions:

#### I. Legal Basis for Modification.

- (a) Continuing authority of the Court to modify prospective application of judgment.
- (b) Sufficiency of change in law to justify modification.
- (c) Authority to modify unaffected by consent nature of decree.



## II. Insubstantial Nature of Objects Raised by Other Parties.

At the inception of this case, the Court was impressed with the language of the 1951 amendment to the Railway Labor Act which provided that, despite any other provisions of the Railway Labor Act or any other statute or law of the United States or of any state, any carrier affected by the Railway Labor Act and a labor organization duly designated and authorized to represent employees<sup>a</sup> in accordance with the requirements of that Act shall be permitted to make agreements requiring, as condition of continued employment, that within 60 days following the beginning of such employment, etc., all employees should become members of the labor organization representing their craft. However, from the history of the 1951 amendment, as reflected by the proceedings in Committees and as determined by the Supreme Court in the case of *Railway Employees' Dept. v. Hanson*, 351 U. S. 225, "the union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employers to enter into union shop agreements."

This Court has concluded that the Railway Labor Act as amended permits the railroad and bargaining unions to effectuate by agreement a union shop. Correspondingly, the Act leaves the railroad and bargaining unions at liberty to agree that a union shop shall not prevail and that a condition of retention of employment shall not be the maintenance of union membership by an employee in the bargaining union or any union. This reasoning applied to the agreement which underlay the decree of December 7, 1945, when the Railway Labor Act forbade a union shop, forces the Court to the conclusion that the unions were not compelled to agree that membership in a union would not be required of the plaintiffs as a condition of employment in any bargaining agreement then in effect between

the railroad and the unions, or such agreements as might thereafter be in effect between the railroad and the defendant unions in accordance with the Railway Labor Act.

A reading of the judgment will show a reference in each instance where the injunction was given, in referring to the bargaining agreement, not only to the agreement then in effect but to such future agreements as might thereafter be effected between the railroad and the bargaining unions. There was then no provision in the Railway Labor Act prohibiting the railroad and the unions from agreeing that a union shop should not obtain. There is no prohibition now in the Railway Labor Act as amended prohibiting the railroad and the bargaining unions from agreeing that a union shop shall not prevail. Under the teaching of the Hanson case, if the union shop agreement is permissive, it is also permissive to agree that a union shop shall not prevail.

The Court agrees with counsel for the unions that there is continuing authority in the Court to modify the prospective application of a judgment of injunction. This is the teaching of the case of the United States v. Swift & Company, 286 U. S. 106, where the Supreme Court said there was no doubt that a court of equity has power to modify an injunction in adaptation to changed conditions though the Injunction was entered by consent. The Court said, "Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need . . . The result is all one whether the decree has been entered after litigation or by consent." There remains the question: should that power be exercised in this case?

Considering counsel's second heading, the sufficiency of change in law to justify modification, it is concluded that the reasoning of the Swift case leads to the conclusion that the change in the Railway Labor Act in 1951, deleting the prohibition against a union shop and making it permissive for the railroad and the bargaining unions to provide for a union shop, does not authorize a modification of the decree which enjoined the railroad and the unions from providing for a union shop in existing agreements or those to be thereafter made under the provisions of the Railway Labor Act. The law would have prohibited the then making of such an effective bargain had no agreement been made. In the Swift case, the Supreme Court said, "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

Finally, upon counsel's proposition that the nature of objections raised by the railroad and the original plaintiffs are insubstantial, it is shown without an attempt at refutation that bitterness and hostility exist between the union and non-union employees of the railroad, and also between the unions and their members who worked during the strike of 1955. The existence or non-existence of animosity, hostility, or bitterness is not decisive of the question involved on the pending motion. Counsel for the unions insist that any threat of reprisal from that source could be avoided by suitable provision in the judgment or order of modification in addition to the safeguard provided in the 1951 amendment to the Railway Labor Act. The circumstances proven do not convince the Court that such supervision of the conduct of a union of its affairs among its own membership, as such a provision might entail, should be undertaken.

It is to be remembered that the provisions of the Rail-

way Labor Act made illegal a union shop in 1945, when the injunction was agreed upon. Hence, it was then unnecessary for the railroad and the unions to agree, as they did, that the non-union members should not then be required to join or maintain membership in any of their craft unions as a condition precedent to employment. The law so prohibited, Section 152, Fourth and Fifth, Title 45, United States Code, Railway Labor Act. The railroad and unions went further to provide by their agreement that no such requirement of union membership should thereafter be in effect in any bargaining agreement in accordance with the provisions of the Railway Labor Act. The 1951 amendment to the Act did no more than make negotiations for a union shop permissive, Railway Employees' Dept. v. Hanson, supra. The amendment did not nullify the agreement or the injunction. It did not prohibit an agreement between the railroad and the unions that a union shop should not exist. Hence, the Court leaves the parties as they agreed to be and to remain.

The motion to modify is overruled and an order so providing will be tendered for entry by counsel for plaintiffs in accordance with Rule 7 of the local rules of this Court.

Roy M. Shelbourne  
United States District Judge

August 7, 1958

A. Copy: Attest

Martin R. Glenn, Clerk  
By Loraine Miller, Deputy Clerk

Counsel for Plaintiffs:  
Marshall P. Eldred  
Brown and Eldred  
301 W. Main Street  
Louisville 2, Kentucky

**Counsel for Movant Defendants,  
System Federation No. 91, Etc., et al.**

**Robert E. Hogan  
Kentucky Home Life Building  
Louisville 2, Kentucky  
Mulholland, Robie & Hickey  
741 National Bank Building  
Toledo 4, Ohio  
Schoene & Kramer  
1625 K Street, N. W.  
Washington 6, D. C.**

**Counsel for Defendant  
Louisville & Nashville Railroad Company  
Woodward, Hobson & Fulton  
1805 Kentucky Home Life Building  
Louisville 2, Kentucky**

**APPENDIX C**

**In the  
DISTRICT COURT OF THE UNITED STATES**

**For the Western District of Kentucky  
at Louisville**

**No. 942**

---

**O. V. WRIGHT, ET AL.,**

*Plaintiffs*

**VS.**

**SYSTEM FEDERATION No. 91, EMPLOYEES'  
DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL.,**

*Defendants*

---

**JUDGEMENT, DECREE AND INJUNCTION—Entered**

**December 7, 1945.**

By consent and agreement of all parties to this action, it is ordered, adjudged and decreed as follows:

That the defendants, other than the defendant Railroad, and all of the subordinate lodges and locals of the defendant Unions, acting as the duly designated and authorized representatives of any employees of defendant Railroad, are, in accordance with the provisions of the Railway Labor Act and in accordance with the duly adopted bargaining agreements between the defendant Railroad and defendant Unions, under the obligation and duty to represent and treat fairly and impartially, and without discrimination based on membership or non-membership



in any labor organization, all members of the crafts or classes of boilermakers, machinists, carmen, sheet metal workers, electricians, power house employes and railway shop laborers, including the plaintiffs to this action, without regard to whether said employes, or any of them, are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization;

That the defendant Railroad, in accordance with the provisions of the Railway Labor Act and in accordance with the duly adopted bargaining agreements between the said Railroad and the defendant Unions, is under the duty and obligation to refrain from discrimination against its employes in the crafts or classes of boilermakers, machinists, carmen, sheet metal workers, electricians, power house employes and railway shop laborers, including the plaintiffs to this action, because of or by reason of the failure or refusal of said employes to join or retain their membership in any of defendant labor organizations, or in any labor organization;

That the plaintiffs in this action and all other employes of the defendant Railroad employed in the boilermakers, machinists, carmen, sheet metal workers, electricians, power house employes and railway shop laborers crafts or classes, who are not members of the defendant labor organizations, or any subordinate lodge or local thereof, shall from and after the date hereof and in accordance with the collective bargaining agreements, be entitled, irrespective and without regard to whether said employes, or any of them, are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization, to the rights of promotion to preferred jobs, to jobs in a higher classification paying a higher rate of pay, to proper protection of seniority, to bid on or be assigned to vacancies, to leaves of

absence with proper protection of seniority and to their proper share of overtime work and compensation therefor, as provided for in such agreements now in effect or that may hereafter be in effect in accordance with the Railway Labor Act;

That all of the defendants, and all of the subordinate lodges and locals of the defendant Unions acting as the duly designated and authorized representatives of any employees of defendant Railroad, their officers, agents, employees and members, and the defendant Railroad, be and they are hereby enjoined from requiring that the plaintiffs and the classes represented by them in this action join or retain their membership in any of said defendant labor organizations, or any labor organization, as a condition to receiving promotion, leaves of absence, proper protection of seniority, overtime work and any other rights or benefits which may arise out of or be in accordance with the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the Railway Labor Act; and are enjoined from denying to said plaintiffs, or the classes represented by them in this action, promotion to such preferred jobs, jobs in a higher classification with a higher rate of pay, leaves of absence, proper protection of seniority, overtime work or any other right or benefit arising out of or in accordance with the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, for the sole and only reason that the plaintiffs or the classes represented by them in this action are not members of or refuse to join or to retain their membership in any of said defendant labor organizations, or any labor organization; and they are fur-

ther enjoined, in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may be hereafter in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of defendant labor organizations, or any labor organization;

That one-half the costs of this action be paid by defendant Railroad and the other half thereof be paid by the defendant Unions.

The Court retains control of this action for the purpose of entering such further orders as may be deemed necessary or proper.

Approved: Dec. 7, 1945

Shackelford Miller, Jr.

Judge United States District Court,  
Western District of Kentucky.

Brown and Eldred

Attorneys for Plaintiffs.

Woodward Dawson Hobson & Fulton

Attorneys for Defendant Railroad.

Mulholland, Robie & McEwen

and

Robert E. Hogan

Attorneys for all defendants other  
than Defendant Railroad.

A Copy—Certified.

W. T. Beckham, Clerk

By M. H. Hogan,

Deputy Clerk

**PROOF OF SERVICE**

I, Richard R. Lyman, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of March, 1960, I served copies of the foregoing Petition for a Writ of Certiorari on the several parties thereto as follows:

1. On respondent Louisville and Nashville Railroad Company by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, as follows:

John P. Sandidge,  
Woodward, Hobson & Fulton  
1805 Kentucky Home Life Building  
Louisville, Kentucky,

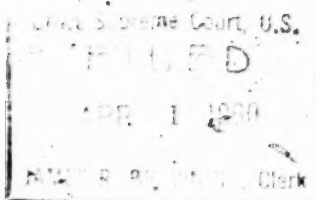
H. G. Breetz,  
Louisville and Nashville Office Building  
Ninth & Broadway  
Louisville, Kentucky.

2. On respondents other than Louisville and Nashville Railroad Company by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record, as follows:

Marshall P. Eldred,  
Brown & Eldred  
Board of Trade Building  
Louisville 2, Kentucky.

.....  
Richard R. Lyman

FILE COPY



IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1959

No. ~~250~~ 48

**SYSTEM FEDERATION No. 91, RAILWAY  
EMPLOYES' DEPARTMENT, AFL-CIO,  
ET AL.,** Petitioners,

*versus*

**O. V. WRIGHT, ET AL.,** Respondents.

**BRIEF OF RESPONDENT LOUISVILLE AND NASH-  
VILLE RAILROAD COMPANY IN OPPOSITION  
TO PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF AP-  
PEALS FOR THE SIXTH CIRCUIT.**

**JOHN P. SANDIDGE,  
WOODWARD, HOBSON & FULTON,  
1805 Kentucky Home Life Building,  
Louisville, Kentucky.**

**H. G. BREETZ,  
W. L. GRUBBS,  
M. D. JONES,  
JOSEPH L. LENIHAN.**

**908 West Broadway,  
Louisville, Kentucky.**

*Attorneys for Respondent Louis-  
ville and Nashville Railroad  
Company.*

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IN THE  
**Supreme Court of the United States**

October Term, 1959

No. 756

---

SYSTEM FEDERATION No. 91, RAILWAY  
EMPLOYEES' DEPARTMENT, AFL-CIO,  
ET AL., - - - - - *Petitioners,*

*v.*

O. V. WRIGHT, ET AL., - - - *Respondents.*

---

**BRIEF OF RESPONDENT LOUISVILLE AND NASH-  
VILLE RAILROAD COMPANY IN OPPOSITION  
TO PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF AP-  
PEALS FOR THE SIXTH CIRCUIT.**

---

**I. THE OPINIONS OF THE UNITED STATES DIS-  
TRICT COURT AND THE UNITED STATES COURT  
OF APPEALS FOR THE SIXTH CIRCUIT.**

The Opinion of the United States District Court for the Western District of Kentucky, Chief Judge Roy M. Shelbourne, is reported in 165 F. Supp. 443. The Per Curiam Opinion by Circuit Judges McAllister, Martin and Cecil of the United States Court of Appeals for the Sixth Circuit is reported in 272 F. 2d 56.

## II. JURISDICTION OF THE COURT.

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit entered December 5, 1959, by means of a writ of certiorari is contained in 28 U.S.C. Sec. 1254 (1).

## III. STATUTES INVOLVED.

45 U.S.C. Sec. 152; Third, Fourth, Fifth, Eighth, Ninth and Eleventh (44 Stat. 577, 48 Stat. 1186, 62 Stat. 909, '64 Stat. 1238), being parts of the Railway Labor Act. Subsection Eleventh is quoted verbatim on pages 2-4 of the Petition for a Writ of Certiorari of System Federation No. 91. Subsections Third, Fourth, Fifth, Eighth and Ninth are set forth in the Appendix hereof.

## IV. COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

A. Did the District Court abuse its discretion in refusing to modify an injunction protecting employees against discrimination by the Railroad and the Unions because of non-union membership, when the Unions, the moving party, failed to make, as required by *United States v. Swift & Company*, 286 U. S. 106, a clear showing of extreme hardship such as to justify a finding that the Unions were victims of oppression or grievous wrong?

B. Were the District Court and the Circuit Court of Appeals correct in following the rule concerning the showing required of the moving party as set forth by this Court in *United States v. Swift & Company*, 286 U. S. 106?

C. Since there was no change in the factual situation justifying a modification of the injunction, does the mere change of the law made by the 1951 Amendment to the Railway Labor Act (45 U.S.C. Sec. 152, Eleventh) justify the sought modification, particularly where, as here, the injunction was based upon an agreement of the parties that the prohibition of the union shop was to have prospective application?

D. Was the motion to modify the injunction, on the sole ground of change of law, properly denied where the uncontradicted proof establishes that the moving party has unclean hands?

## V. COUNTER-STATEMENT OF THE FACTS.

In order to give the Court the proper background in this case, it will be necessary to state the facts concerning this litigation from its inception in 1945.

On July 16, 1945, the plaintiffs, employees (16a-17a)\* located at various points on the Louisville and Nashville Railroad, brought an action against System Federation No. 91, Railway Employees' Department,

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\*Numerals followed by letter "a" refer to Petitioners' Appendix filed in the Court of Appeals. Numerals followed by letter "b" refer to pages of Appendix of the Respondents (other than the Railroad) filed in the Court of Appeals.

American Federation of Labor, a group of affiliated international and local labor organizations, various officers of the local labor organizations and the Louisville and Nashville Railroad Company.

The complaint alleged (23a-36a) that the defendants had consistently violated the purpose, terms and provisions of the Railway Labor Act by hostile discrimination against the members of the different crafts who were not members of the Unions and their locals, for the purpose of giving preference to members of the different crafts who were members of the Unions. It was alleged that said defendants followed towards the members of the crafts who were not members of the Unions a policy calculated to limit the freedom of association among said employees and to force them into joining the Unions, putting into effect a virtual "closed shop". It was alleged, further (25a-26a), that the Unions and the Railroad had violated the Railway Labor Act in denying to the employees who did not belong to the Unions:

- (1) The right to bid on vacancies;
- (2) The right to promotion to higher jobs or preferred jobs; and
- (3) The right to work overtime at punitive rates of pay.

The plaintiffs alleged (26a-32a) that they were damaged in the sum of \$5,000.00 each and had suffered irreparable injury, and would continue to suffer further irreparable injury unless the Court granted



the relief requested. Summarily stated, the plaintiffs prayed for:

- (1) A declaratory judgment, binding on all of the parties, settling and declaring the rights, interests and legal relations of the respective parties (37a-38a);
- (2) An injunction to protect and enforce such rights and obligations as might be declared (38a-39a); and
- (3) Judgment awarding each of the plaintiffs \$5,000.00 (40a).

After the taking of depositions, a consent judgment, decree and injunction were entered by the District Court (41a). In addition, releases were secured by the defendants from the plaintiffs, upon the payment to the plaintiffs collectively of the total sum of \$5,000.00 (71b), \$2,500.00 having been paid by the Railroad and \$2,500.00 by the Unions, and the agreement of the parties that formed the basis of the injunction.

The consent decree, entered December 7, 1945, was entered with the consent and by agreement of all the parties. It ordered, adjudged and decreed as follows:

- (1) That the Unions are under the obligation and duty to represent and treat fairly and impartially, and without discrimination based on membership or non-membership in any labor organization, all members of the crafts or classes, including plaintiffs, without regard to whether

said employees are members or retain their membership in the Unions (41a);

(2) That the Railroad is under the obligation and duty to refrain from discrimination against its employees in the crafts or classes, including the plaintiffs, because of the failure or refusal of said employees to join or retain their membership in any of the Unions (42a);

(3) That the plaintiffs and all other employees of the Railroad in the crafts or classes involved who are not members of the Unions shall, in accordance with the collective bargaining agreements, be entitled, irrespective of and without regard to whether they join or retain membership in the Unions, to the rights of promotion, the proper protection of seniority, the right to bid on and be assigned to vacancies, the right to leaves of absence with proper protection of seniority, and the right to a proper share of overtime work, as provided for in such agreements then in effect or that may thereafter be in effect in accordance with the Railway Labor Act (42a-43a);

(4) That all of the defendants be enjoined from requiring the plaintiffs, and the classes represented by them, to join or retain their membership in the Unions as a condition to receiving promotion, leaves of absence, proper protection of seniority, overtime work and other rights or benefits which may arise out of or be in accordance with regularly adopted bargaining agreements

then in effect or that might thereafter be in effect (43a); and

(5) That the defendants be further enjoined, in the application of the provisions of the regularly adopted bargaining agreements then in effect or that might thereafter be in effect, from discriminating against the plaintiffs and the classes represented by them by reason of, or on account of, the refusal of said employees to join or retain their membership in any of the Unions (44a).

The judgment, decree and injunction have remained in full force and effect, and twice the Railroad and the Unions have been called upon to defend contempt citations. *System Federation No. 91 v. Reed, et al.*, 180 F. 2d 991 (C. A. 6th); *John R. Cain v. System Federation No. 91, et al.*, February 27, 1946, Western District of Kentucky, Civil Action 942 (Not Reported).

A motion to modify the injunction (45a) was filed July 2, 1957, by System Federation No. 91, Railway Employees' Department, A.F.L.-C.I.O. (formerly known as System Federation No. 91, Railway Employees' Department, American Federation of Labor), and other Union defendants or their successors.

The Unions moving to modify stated (45a) that they and other labor organizations representing different crafts of the Railroad's employees were currently seeking to negotiate, with respect to the employees of the Railroad represented by them under the Railway Labor Act, agreements requiring the em-

ployees so represented, as a condition of their continued employment, to become and remain members of the organizations representing their respective crafts, subject to the limitations and conditions prescribed in Section 2, Eleventh, of said Act as amended (49a).

The Unions further alleged (46a) that at the time of the institution of this action, and at the time of the entry of the decree of the injunction, Section 2, Fourth and Fifth, of the Railway Labor Act (45 U.S.C. Sec. 152, Fourth and Fifth) made it unlawful for carriers to interfere in any way with the organization of their employees or to coerce or compel their employees to join or remain, or not to join or remain, members of any labor organization. Such prohibitions were generally construed as creating the "open shop" in the railroad industry, and making unlawful the closed shop or union shop, as well as other forms of union security agreements (46a).

In paragraph 5 of the motion (49a) it was alleged that the 1951 Amendment (45 U.S.C. Sec. 152, Eleventh) to the Railway Labor Act terminated, to the extent specified therein, the employees' right to be free from the requirements of union security agreements and that it is no longer equitable that said decree of injunction should have prospective application to prohibit the defendants from negotiating such agreements pursuant to express Congressional authorization.

The Unions' motion to modify the injunction was based solely on the change of law. They introduced

no evidence on the question whether or not there had been a change in the factual situation which had existed at the time of the entry of the consent decree and injunction. The employee respondents introduced evidence showing that even at the time of the proceeding to modify, abuse and threats of discrimination continued to be directed against employees not in complete accord with union activities and policies (1b-69b). The abuse and threats were intensified following a strike in 1955. After this strike it was necessary for the Railroad Company to provide police protection for such employees and, even at the time of the proceeding to modify the injunction, such police protection was still necessary at some points (59b). The record in this case shows that if the Unions are released from the restraint of this injunction, they or their members will make every effort to deprive the non-union men of their jobs. The oral evidence shows that personal hatred and violence had been practiced, and are being practiced, against non-union workers. This injunction alone has preserved their jobs (60b).

In this proceeding to modify the injunction, the District Court concluded (165 F. Supp. 443, 447, 448) from the history of the 1951 Amendment of the Railway Labor Act, as reflected by the proceedings in Committees of Congress and as determined by this Court in the case of *Railway Employees' Department, et al. v. Hanson*, 351 U. S. 225, that the union shop provisions of the Railway Labor Act are permissive, and that Congress has not compelled or required carriers and employees to enter into union shop agree-

ments. The District Court therefore concluded (page 448) that the 1951 Amendment to the Act leaves the Railroad and the bargaining Unions at liberty to agree that a union shop shall not prevail. This reasoning, applied to the agreement which underlay the injunction and declaration of rights of December 7, 1945, when the Railway Labor Act forbade a union shop, forced the Court to the conclusion that the unions had not been compelled to agree (as they did freely agree at the time of the consent decree) that membership in a Union would not be required of the plaintiffs as a condition of employment in any collective bargaining agreement then in effect between the Railroad and the Unions, or in such agreements as might thereafter be in effect between the Railroad and the Unions in accordance with the Railway Labor Act.

The Court noted, at page 448, that a reading of the agreed judgment will show that it refers not only to any collective bargaining agreement then in effect but to such future agreements as might thereafter be made between the Railroad and the bargaining Unions; that in 1945 there was no provision in the Railway Labor Act prohibiting the Railroad and the Unions from agreeing that a union shop should not obtain; and that there is no prohibition now in the Railway Labor Act prohibiting the Railroad and the bargaining Unions from agreeing that a union shop shall not prevail. Therefore, under the *Hanson* case, *supra*, the Court reasoned, if the union shop agreement is permissive, it is also permissive to agree that a union shop shall not prevail.



The District Court, 165 F. Supp. 443, 448, concluded that it has continuing authority to modify the injunction, under the doctrine of *United States v. Swift & Company*, 286 U. S. 106, but that the change in the Railway Labor Act in 1951 deleting the prohibition against a union shop and making it permissive does not compel a modification of the decree which enjoined the Railroad and the Unions from providing for a union shop in existing agreements or those to be thereafter made. The Court concluded that the standard set up in the *Swift* case for modification of an injunction had not been met, in that there was no clear showing of grievous wrong evoked by new and unforeseen conditions which should lead the Court to change what had been decreed, after years of litigation, with the consent of all concerned.

The District Court did not consider the existence or non-existence of animosity, hostility, or bitterness as decisive of the question (165 F. Supp. 443, 449), but expressed an unwillingness, in view of the circumstances proven, to supervise the affairs of the Unions to prevent the Unions from discriminating against the present non-union employees if they were taken into the Unions.

The District Court stated that the provisions of the Railway Labor Act (45 U.S.C. Sec. 152, Fourth and Fifth) made illegal a union shop in 1945 when the injunction was agreed upon. Hence, it was then unnecessary for the Railroad and the Unions to agree, as they did, that the non-union members should not be required to join or retain membership in any union.

The Court pointed out that the Railroad and Unions went further and agreed (between themselves and with the employees of the Railroad) that no such union membership should thereafter be required in any bargaining agreement.

The District Court held that the 1951 Amendment did no more than make negotiations for a union shop permissive, as was recognized in the *Hanson* case, *supra*. It stated that the Amendment did not nullify the agreement or the injunction in question, and that it did not prohibit an agreement between the Railroad and the Unions that a union shop should not exist. The Court concluded to leave the parties as they agreed to be and to remain, and, accordingly, it overruled the motion to modify.

Upon appeal to the United States Court of Appeals for the Sixth Circuit (272 F. 2d 56), that Court dealt realistically with the problem, which previously had been before it. It noted that this controversy had its beginning in bitter disagreements between groups of union and non-union employees arising many years ago and that "it also stems from a strike, accompanied by much violence, in 1955, in which a railroad bridge was burned, and certain employees were sentenced to prison terms, for violation of, and conspiracy to violate, the Federal Train Wreck Act," 18 U.S.C. Sec. 1992. It cited *Stanley v United States*, 245 F. 2d 427 (C. A. 6th), the case involving those convictions. After reciting the facts of the case at bar, the Court of Appeals affirmed the ruling of the District Court that when the injunction was issued the parties therein, by

their consent thereto, provided that no requirement of union membership should thereafter be in effect in any bargaining agreement. It agreed that the 1951 Amendment did no more than make negotiations for a union shop permissive, and did not nullify the agreement or the injunction issued. It found no error in the order of the District Court which, *under the circumstances of the case*, left the parties as they agreed to be.

## VI. REASONS FOR DENYING THE WRIT.

- A. The Petition for a Writ of Certiorari Should Be Denied Because the District Court and the Circuit Court of Appeals Followed the Law as Set Forth by This Court in *United States v. Swift & Company*, 286 U. S. 106, and *Ford Motor Company v. United States*, 335 U. S. 303.

This case is governed by the decisions in *United States v. Swift & Company*, 286 U. S. 106, and *Ford Motor Company v. United States*, 335 U. S. 303. Both of the lower Courts have followed those decisions, as is plainly to be seen from their respective opinions. Under Rule 19 of this Court's Rules, the petition for a writ of certiorari should therefore be denied.

In determining whether this case should be reviewed, the evidence introduced by the non-union workers may well be analyzed. Their uncontradicted evidence conclusively shows that one of the purposes of the Unions or the members thereof in seeking a

union shop agreement is to force the non-union man out of his job (14b). As stated by one witness (14b):

"Yes, sir, up in my locker room, since this letter has been out, they would never tell you anything, but they always talking where you could hear it, as soon as this injunction is mortified (sic), we will get all the scabs, we will get all the scabs. They said that on the 2nd of January, I heard a gang of them saying the same thing, on the 2nd of January, said, as soon as this injunction is dissolved, we are going to get all the scabs."

It is clear that the discrimination forbidden by the injunction is still being practiced by union members, including discrimination against those who testified in this case (79b). This is the plain import of the letter of Mr. Jake Paschall, General Chairman, Brotherhood of Railway Firemen and Enginemen, to certain Alabama lodges dated February 6, 1958, concerning the witnesses who testified at the trial (79b-80b).

As was pointed out by the District Court (17a), the Unions made no attempt to rebut the testimony given as to the bitterness and hostility that exist between the employees who are union members and the non-union employees, and also between the Unions and their members who worked during the 1955 strike.

The doctrine of *United States v. Swift & Company*, 286 U. S. 106, followed by the lower Courts, may be gathered from the following quotations therefrom:

" . . . The question is not whether a modification as to groceries can be made without

prejudice to the interests of producers of cattle on the hoof. The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect . . .” (Pages 117-118)

“ . . . The opportunity will be theirs to renew the war of extermination that they waged in years gone by.” (Page 118)

“ . . . The difficulty of ferreting out these evils and repressing them when discovered supplies *an additional reason why we should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be.*” (Page 119) (Emphasis added.)

“ . . . No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.” (Page 119)

“ . . . Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall.” (Page 119)

“What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing.” (Page 120)

To the same effect is *Ford Motor Company v. United States*, 335 U. S. 303.

Under the authorities cited it is clear that the burden of proof was on the Petitioners to show that inequity and grievous wrong would result from continuing the injunction in force. No change in the factual situation having been shown—indeed, it having been shown that present conditions are, if anything, worse than those which obtained at the time the injunction was agreed upon—there was no justification for any modification of the injunction. Please compare the *Ford Motor* case, where this Court stated (page 322): “The Government [movant] has not sustained the burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated.”

In the Petition it is contended that the effect of the denial of the requested modification is to maintain an everlasting prohibition against a union-shop agreement and to perpetuate a restraint against conduct now lawful (page 9). Such a contention discloses a misunderstanding by the Petitioners of the decisions below, and is tantamount to an admission by the Unions that they will perpetually practice abuse and discrimination. The decisions of the Courts below are simply to the effect that upon the present record a modification of the injunction should not be granted. The Unions did not introduce any evidence, and the reason they did not do so must have been that they well knew that animosity and bad faith towards the non-union workers still exist.



In the consent decree, the parties, at a time when the Unions were urging a change of the law, agreed (43a-44a): “. . . and they [the Railroad Company and the Unions] are further enjoined, in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may be hereafter in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of defendant labor organizations, or any labor organization.” The District Court could only hold that the parties, in agreeing to the consent decree, had in mind future contracts and that they negotiated in such a manner that the consent decree would be effective as to such future contracts. If it had been desired that a change of law should make the decree inapplicable, provision therefor would have been included. No such provision was included. On the contrary, the wording of the agreed decree manifested the clear intent of the parties that the non-union membership provision was to have prospective effect. In the light of this history, the Court exercised sound discretion when it declined the relief requested by the Unions.

The decision as to whether or not equitable grounds for relief are established is a matter within the sound discretion of the trial Court, and the determination

by it should not be disturbed on appeal except for abuse of discretion. *Perrin v. Aluminum Company of America*, 197 F. 2d 254, 255 (C. A. 9th); *Morse-Starrett Products Company v. Steccone*, 205 F. 2d 244, 248-249 (C. A. 9th); *Western Union Telegraph Company v. Dismang*, 106 F. 2d 362, 364 (C. A. 10th). If the facts do not meet the requirements of the rule set forth in *United States v. Swift & Company*, *supra*, a motion under Rule 60 (b) (5), Federal Rules of Civil Procedure, should be denied. *Morse-Starrett Products Company v. Steccone*, *supra*. As clearly shown by the Opinions of the District Court and the Court of Appeals, there was no abuse of discretion below in denying the motion to modify and, therefore, the petition for a writ of certiorari should be denied.

This case is similar in general principle to *Steele v. Louisville & N. R. Co., et al.*, 323 U. S. 192, wherein this Court held that bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of workers.

Another reason for the consent decree having been worded in the manner it was (to the effect that the union-shop clause would not be a provision in any future contract between the Unions and the Railroad) arose from historical fact of which this Court can take judicial notice. *Dennis v. United States*, 339 U. S. 162, 169; *Bowles v. United States*, 319 U. S. 33, 35; 20 *Am. Jur.*, Evidence, Section 44, page 67. The non-union men had every reason to fear such a change in the law as was effected by the 1951 Amendment because the

National Labor Relations Act applicable to other industries at that time did permit closed shop contracts (Section 8(a) (3), National Labor Relations Act, 29 U.S.C. Section 158(a) (3)). They therefore sought to protect themselves by means of the agreed decree.

Moreover, it was well known at the time of the entry of the consent decree herein that the railroad Unions had been exerting every effort to amend the Railway Labor Act to provide for a union shop. Presidential Orders, as well as the history and background of the Amendment, make this perfectly apparent. Attention is especially invited to the Transcript of the Proceedings of the National Railway Labor Panel Emergency Board, Chicago, Illinois, 1943, Volume 2. On September 25, 1942, notices were served by the Unions on the railroads, including the Louisville and Nashville Railroad, demanding a union shop (Volume 2, page 2106). The railroads declined the demand on the ground that the existing Act prohibited union shops (45 U. S. C. Sec. 152, Fourth and Fifth). In order to resolve this issue along with demands for wage increases, the President, pursuant to 45 U.S.C. Sec. 160, created an Emergency Board and referred the matter to it. In the briefs filed with the Board, the Unions argued that there was nothing in the Railway Labor Act which prevented the Emergency Board from recommending that the Act itself be amended to provide for a union shop if such a procedure appeared to be the most feasible method of settling a dispute (Volume 2, pages 1979-1980, *supra*). They also urged that the emergency war powers of the President were such that by executive order or other-

wise a union shop could be established in the industry (Volume 2, pages 1972-1976, *supra*). However, the Emergency Board and the President refused to accede to the Unions' demands.

With this background in mind, it is perfectly apparent why the non-union men protected themselves, as they did, in the agreement and consent decree against ever being required to join a Union under a union-shop agreement between the Railroad and the Unions. All parties knew at the time of the agreement and consent decree in 1945 that the Unions were trying to get the law so amended as to make the union shop legal.

The non-union men have every right to ask for the continuance of the decree because such protection was one reason for their placing great emphasis upon such an agreement and order and in placing practically no emphasis on the recovery of damages. The fact that the Unions made a bargain which they now regret is no reason for not enforcing the agreement as set forth in the order. *United States v. Swift & Company, supra*, page 119.

**B. The Decisions of the Circuit Court of Appeals and the District Court Are Not in Conflict With Applicable Decisions of This Court or the Courts of Appeals of Other Circuits.**

Petitioners rely upon *United States v. Swift & Company*, 286 U. S. 106, but it does not support their position. In that case, the defendants, like the Petitioners here, moved for modification of an outstanding

injunction but failed to carry the necessary burden. The injunction therefore was not modified.

Other cases cited by Petitioners also fail to support their position.

In *Coca-Cola Company v. Standard Bottling Company*, 138 F. 2d 788 (C. A. 10th), a consent decree had been entered against the Standard Bottling Company enjoining it from selling any products having in their names the word "Cola" or "Coca-Cola" or similar words. During the pendency of the injunction, a number of other companies in the territory began selling similar products, such as Pepsi-Cola, Cleo-Cola and Royal Crown Cola. In view of this change in the factual situation, a modification was made in the injunction. In the present case, however, there is no change in the factual situation concerning the discrimination at which the injunction was directed. Moreover, the *Coca-Cola* case did not involve, as this one does, contract rights of the parties or classes affected by the decree. Thus, the case is not applicable here.

*Chrysler Corporation v. United States*, 316 U. S. 556, is no authority for modifying the decree in this case. It simply holds that where a decree is impossible of performance, due to circumstances beyond the control of the parties, the injunction *may* be modified. This is not the situation here. Moreover, the ruling in that case has been limited by the later case of *Ford Motor Company v. United States*, 335 U. S. 303, wherein this Court refused to make a "mechanical application" of the *Chrysler* case and stated that the moving party had the burden of showing good cause

why a court of equity should grant relief from a carefully drawn decree ending years of litigation. Thus, the decisions below are not contrary to the law contained in these two cases.

In *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U. S. 421, the basis for the subsequent dissolution of an injunction was merely a declaration by Congress that a bridge in question did not interfere with navigation, a fact which was true at the time the injunction was issued as well as at the time the injunction was dissolved. The injunction was not dissolved because of the change of any statutory law in existence at the time the injunction was entered. The subsequent Act of Congress was more in the nature of a declaration of a fact. Congress in effect said that as far as it was concerned, the injunction should not have issued in the first place.

*Western Union Telegraph Company v. International Brotherhood of Electrical Workers*, 133 F. 2d 955 (C. A. 7th), is not in conflict with the decisions below, for in that case the modification of the injunction was not granted. In the *Western Union* case, it was contended that a change of law justified the modification of the injunction against the labor union. The Norris-LaGuardia Act (29 U.S.C. Sec. 101, *et seq.*) had been passed, and it was contended that the injunction should be set aside. The Seventh Circuit, at page 959, considered the admonition of this Court in the *Swift* case, *supra*, to the effect that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead the Court to change what



was decreed after years of litigation." The record showed, as this record shows, that the union had not mended its ways, and the case was sent back to the trial Court for inquiry into the good faith of the union and whether it came into Court with "clean hands." In the present case the Unions made no attempt to show "clean hands". Thus, on the authority of the *Western Union* case, since no showing was here made by the Unions except that there had been a change of law, and since a showing was made by the affected employees that the Unions did not have "clean hands", the motion was properly denied. It is undisputed that violence and undiminished discrimination by the Unions or by members of the Unions continue at many points on the Railroad. The *Western Union* case is actually against the Petitioners rather than for them.

The decisions below are not contrary to *Ladner v. Siegel*, 238 Pa. 487, 148 A. 699 (which was cited by this Court in the *Swift* case), because the *Ladner* case did not involve the question of a change of law alone but involved also the question of a change in the factual situation between the date of the issuance of the original decree and the motion for modification. The problem in that case involved the location of a garage and whether or not it could be used as a public garage. The surrounding property had, in fact, changed from residential to commercial. The Pennsylvania Court thus set out succinctly the formula for modification of an injunction (148 A. 702):

"The modification of a decree in a preventive injunction is inherent in the court which granted

it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, and (b) where the law, common or statutory, has changed, been modified or extended, and (c) *where there is a change in the controlling facts on which the injunction rested.*” (Emphasis added.)

It is therefore clear under the *Ladner* case, that, in order to justify a modification of an injunction, there must be a change in the factual situation that formed the basis for the injunction. A change of law alone is not sufficient, and the Court in the *Ladner* case did not approve the modification of the injunction upon the ground of statutory change alone.

The injunction issued in the case of *Santa Rita Oil Company v. State Board of Equalization*, 112 Mont. 359, 116 P. 2d 1012, 136 A.L.R. 757, was based solely upon the law as it had previously been laid down by this Court. After its issuance, this Court reversed its former decisions thereby entirely removing the foundation of the injunction. The injunction in the present case, in contrast, was bottomed upon the discrimination practiced against certain employees, and such discrimination remains unlawful. Also forming the basis of the injunction in the present case is the underlying agreement of the parties prohibiting provisions in any future collective bargaining agreement which would require the employee respondents to join a union.

Analysis of the case of *National Electric Service Corporation v. District 50, United Mine Workers*, 279 S. W. 2d 808 (Ky.), will show that, as in the *Santa*

*Rita* case, the injunction had been rested by the trial Court *solely* on the law as it then existed, and this Court, by a subsequent decision, changed the law. Even in those circumstances, the Court of Appeals of Kentucky held that modification of the injunction was not a matter of absolute right but lay in the discretion of the trial Court.

In *Degenhart v. Harford*, 59 Ohio App. 552, 18 N. E. 2d 990, the rule is stated that for an injunction to be modified because of a change of law, the situation must have changed with respect to a *fact* which was the basis of, and material to, the original injunction. Thus, in the *Degenhart* case, the defendant had been restrained from maintaining and operating a funeral home in the residential district upon the ground

- (1) that it was a nuisance, and
- (2) that it was forbidden by city ordinance.

The Court held that the fact that the city subsequently modified its zoning ordinance so as to permit the maintenance of the funeral home within a residential district, did not justify a modification of the injunction. This ruling was based on the sound ground that the original ordinance was not the basis for the conclusion that the operation constituted a nuisance. By the same token, the injunction in this case was rested on the ground that there was discrimination practiced by the defendants in relation to the non-union employees. A change of law on a secondary proposition permitting a union shop in no way touched the main principle.

Another case directly in point is *Sunbeam Corporation v. Charles Appliances*, 119 F. Supp. 492 (S.D., N.Y.). There, the rule is laid down as follows (page 494):

“ . . . The mere change in decisional law upon which a permanent injunction was granted, in and of itself, will not support the opening or modification of the decree. The circumstances and the situation of the parties must so have changed as to make it equitable to do so. This indispensable ingredient is lacking in the case at bar.”

The same rule should be applied here, for the moving Unions have practiced the case on a change of law only. This, in and of itself, is not enough. Please see, also, *Morse-Starrett Products Company v. Steccone*, 205 F. 2d 244 (C. A. 9th).

As stated in *United States v. Radio Corporation of America*, 46 F. Supp. 654, 656 (D., Del.), while a Court may have power to modify injunctions upon a proper showing of a change of circumstances, such modification must be consistent with the purpose of the original injunction and calculated to effectuate and not thwart its basic purpose. *United States v. International Harvester Company*, 274 U. S. 693, 702; *Chrysler Corporation v. United States*, 316 U. S. 556. A modification of the injunction in accordance with the Petitioners' motion would thwart the purpose of the original decree. By indirection, it would deprive the non-union men of the very things that were complained about: the right to overtime, the right to bid on new jobs, and the right of employment. The union shop provision sought by

the modification, in practical effect, goes after the basic means of livelihood of the employee. The basic purpose of the original injunction was to protect the man in his job and in seeking other employment on the Railroad, even though he was a non-union man. If the modification had been granted, that protection of the non-union employees would have been gone.

Discrimination by the Union men continues. Non-union men still need the protection of this injunction. As one witness quoted his fellow workers, ". . . as soon as this injunction is 'mortified', we will get all the scabs . . ." (14b). Under these circumstances, this Railroad, pursuant to the agreement made in good faith, can only oppose the modification of this injunction, which modification would deprive many of its employees of their livelihood.

Clearly, the decisions of the District Court and the Court of Appeals are not contrary to the cases cited in the Petitioners' Brief. In the exercise of sound discretion, the District Court and the Court of Appeals could do no other than to deny the motion to modify.

## VII. CONCLUSION.

It is respectfully submitted that the law concerning this case was well settled by *United States v. Swift & Company*, 386 U. S. 106, and by *Ford Motor Company v. United States*, 335 U. S. 303. The decisions below are not in conflict with any decision of this Court or with decisions of other United States Courts of Appeals. For these reasons the Petition for a Writ of

Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

JOHN P. SANDIDGE,

WOODWARD, HOBSON & FULTON,  
1805 Kentucky Home Life Building,  
Louisville, Kentucky,

H. G. BREETZ,

W. L. GRUBBS,

M. D. JONES,

JOSEPH L. LENIHAN,  
908 West Broadway,  
Louisville, Kentucky,

*Counsel for Respondent Louisville and Nashville Railroad Company.*

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APPENDIX

**APPENDIX.**

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**Railway Labor Act, 45 U. S. C. Section 152:**

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organi-

zations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee; and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the

Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representatives of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

**CERTIFICATE OF SERVICE.**

I, H. G. Breetz, one of the attorneys for Respondent, Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of March, 1960, I served copies of the foregoing brief on the several parties as follows:

1. On petitioners by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, as follows:

Robert E. Hogan  
Kentucky Home Life Building  
Louisville, Kentucky

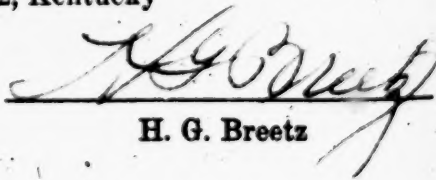
Richard R. Lyman  
741 National Bank Building  
Toledo 4, Ohio

Schoene & Kramer  
165 K. Street, N. W.  
Washington 6, D. C.

Mulholland, Robie & Hickey  
741 National Bank Building  
Toledo 4, Ohio

2. On respondents, other than the Louisville and Nashville Railroad Company, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorney of record, as follows:

Marshall P. Eldred  
Brown & Eldred  
Board of Trade Building,  
Louisville 2, Kentucky

  
H. G. Breetz

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1959

No. 256. 48

**SYSTEM FEDERATION No. 91, RAILWAY  
EMPLOYEES DEPARTMENT, AFL-CIO,  
ET AL.,**

**Petitioners.**

*versus*

**O. V. WRIGHT, ET AL.,**

**Respondents.**

**Brief of Respondents Other Than Louisville and  
Nashville Railroad Company in Response to  
Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit.**

**MARSHALL P. ELDRED,**

Board of Trade Building  
Louisville, Kentucky.

*Attorney for Respondents Other  
Than Louisville and Nashville  
Railroad Company.*

**BROWN AND ELDRED,**

Louisville, Kentucky,  
Board of Trade Building.





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IN THE  
**Supreme Court of the United States**

October Term, 1959.

No. 756.

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SYSTEM FEDERATION NO. 91, RAILWAY  
EMPLOYEES DEPARTMENT, AFL-CIO,  
ET AL., - - - - -

*Petitioners.*

v.

O. V. WRIGHT, ET AL., - - -

*Respondents.*

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**Brief of Respondents Other Than Louisville and  
Nashville Railroad Company in Response to  
Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit.**

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*To the Honorable, the Chief Justice, and the Associate  
Justices, of the Supreme Court of the United States:*

**I. OPINIONS BELOW.**

The opinion of the United States District Court for the Western District of Kentucky, denying the motion for modification of the injunction, is reported in 165 F. Supp. 443. The *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the District Court, is reported in 272 F. 2d 56.



## **II. JURISDICTION.**

This Court has jurisdiction to review the action of the United States Court of Appeals for the Sixth Circuit by means of a writ of certiorari as provided in 28 U. S. C., Sec. 1254(1).

## **III. COUNTER-QUESTIONS PRESENTED.**

1. Did the 1951 Amendment to the Railway Labor Act alone entitle statutory bargaining representatives, previously enjoined from requiring of non-union employees union membership as a condition precedent to employment benefits, to modification of the injunction so as to permit negotiation of union security agreements permitted but not required by such amendment?

2. Were such bargaining representatives precluded from obtaining modification of the injunction by the agreed settlement, by the parties, of all the issues in the case, including an agreement not to require union membership as a condition precedent to employment benefits, which agreement became the decree of the court?

3. Where the original complaint alleged discrimination by unions against non-union employees because of refusal to join and maintain membership in the unions, did the trial court properly consider unrefuted evidence of continued bitterness and hostility between the unions and non-union employees resulting from a strike upon the railroad's property?

4. In asking a modification of an injunction which protects an agreement not to require union membership as a condition to employment benefits, do unions come into court with clean hands when undenied evidence shows bitterness and hostility between the unions and non-union employees and threats of reprisal upon the part of the former against the latter?

5. Did the trial court abuse its discretion in refusing to modify an injunction based upon an agreed settlement of the parties which became the consent decree of the court where there is no change in the factual situation, where the change in the Railway Labor Act is permissive only and where a modification of the injunction would result in grievous wrong to non-union employees rather than to those who seek the modification?

6. Did petitioners meet the burden of proof of showing, as a result of the amendment to the Railway Labor Act, a grievous wrong evoked by new and unforeseen conditions?

7. Did the trial court, in refusing to modify the injunction, depart from the rule enunciated in *United States v. Swift*, 286 U. S. 106, 76 L. Ed. 999?

#### IV. STATUTE INVOLVED.

The statute involved in this case is the Railway Labor Act, as amended, being 45 U. S. C., Sec. 151, *et seq.*, and, in particular, SECTION 2, ELEVENTH, of said Act, being the Act of January 10, 1951, c. 1220, 64 Stat. 1238, 45 U. S. C., SEC. 152, ELEVENTH, which amendment is copied in full on pages 2-4 of the petition for writ of certiorari.

#### V. COUNTER-STATEMENT OF THE CASE.

Petitioners in this case are the six shop craft unions named as defendants in the original complaint filed in the District Court of the United States for the Western District of Kentucky on July 16, 1945, together with the organization within which they worked upon the property of the Louisville and Nashville Railroad Company, known as System Federation No. 91, Railway Employees' Department, AFL-CIO (formerly American Federation of Labor). For the sake of brevity the six shop craft unions may be designated as machinists' union, boilermakers' union, sheetmetal workers' union, carmen's union, electrical workers' union, and shop laborers' union. (See 16a-18a.)\*

Specimen counts from the original complaint (21a-36a) alleged discrimination by defendant unions and

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\*Unless otherwise indicated, numerals followed by the letter "a" refer to pages of petitioners' (appellants') appendix filed in the Court of Appeals, and numerals followed by letter "b" refer to pages of respondents' appendix therein filed.

defendant railroad against plaintiffs and the classes represented by them (being non-union employees of the railroad) in that certain employment benefits were denied to such employees because of their refusal to join or maintain membership in the shop craft unions.

There were twenty-eight of the original plaintiffs. Each sought to recover damages in the sum of \$5,000.00, and, for themselves and the classes they represented, they sought a declaration of rights and a decree, the effect of which was that they were entitled to employment benefits without joining or maintaining membership in the defendant labor organizations. They also sought a permanent injunction against the defendant unions and the defendant railroad *perpetually* restraining and enjoining said defendants from requiring union membership as a condition to receiving employment benefits and from denying to the plaintiffs and the classes represented by them employment benefits because of their refusal to join or to retain membership in the defendant labor organizations (36a-40a).

Following the filing of the complaint below, depositions were taken by the union defendants and the railroad defendant, after which all of the parties entered into a *complete settlement* of the causes of action alleged in the complaint. A release was prepared and signed by all of the plaintiffs (70b-75b) wherein it was stated in part: "Whereas, it is the mutual desire of all of the parties to said action to settle and dispose of all issues in dispute among them in the following manner:" (70b).

The manner in which the settlement was to be effected was specifically set out, including "the entering of a consent decree", the purpose of which "will be to protect the undersigned against any future acts or practices of or by the defendants which will deny to the undersigned any of their rights and benefits under the collective bargaining agreements now in effect or which may hereafter be entered into in accordance with the Railway Labor Act by and between the L. & N. Railroad Company and System Federation No. 91, a copy of which consent decree is attached hereto"; the waiver and release by the said plaintiffs of all claims and the payment to all of the plaintiffs of the sum of \$5,000.00 (70b-71b). The consideration for the release was stated to be the payment of \$5,000.00 and "the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto . . . ." (71b).

It is to be observed that in the settlement of their claims against the defendants, including the right of each individual plaintiff to prove damages and to seek a recovery therefor, the plaintiffs collectively agreed to accept a nominal sum in damages and the agreement of the defendants that plaintiffs and the classes represented by them would not then or in the future be required to join or maintain membership in defendant labor organizations as a condition precedent to employment benefits. This agreement was the real consideration for the settlement.

The original "Judgment, Decree And Injunction" was entered on December 7, 1945, pursuant to the settlement of the case. Its opening sentence reads: "By consent and agreement of all parties to this action, it is ordered, adjudged and decreed as follows:" (41a).

The decree provided that non-union employees of defendant railroad "shall from and after the date hereof" be entitled to certain rights of employment, without regard to membership in the defendant labor organization, as provided in collective bargaining agreements then in effect or that might thereafter be in effect in accordance with the Railway Labor Act (42a-43a). The injunction, which was an integral part of the decree, enjoined the defendant unions and the defendant railroad from requiring non-union employees of the defendant railroad to join or retain membership in the defendant unions as a condition to receiving certain employment benefits arising out of or in accordance with bargaining agreements then in effect or that might thereafter be in effect in accordance with the Railway Labor Act. It enjoined said defendants from denying to non-union employees employment benefits arising out of or in accordance with bargaining agreements then in effect or that might thereafter be in effect in accordance with the Railway Labor Act because of the refusal of said employees to join or maintain membership in any of said defendant labor organizations (43a).

Non-union employees of respondent railroad have been diligent to protect their rights under the original decree and injunction. One example is a contempt



proceeding in this case which went to the United States Court of Appeals for the Sixth Circuit. *System Federation No. 91, et al. v. Reed*, 180 F. 2d 991.

Many non-union employees and some union employees of respondent railroad worked during a very bitter strike which occurred upon the railroad's property in 1955. Some of these employees testified at the hearing of this matter on February 3, 1958. Their evidence shows bitter hostility toward them and threats of reprisal and harrassment by defendant unions, if not loss of employment (1b-69b).

Respondents are zealous in preserving and protecting the rights which they won by consent and agreement of petitioners in the settlement of their original cause of action in this case. Responses to the motion to modify were filed by certain of the original plaintiffs (61a-65a, 74a-77a), and by certain intervenors (80a-88a).

The motion of petitioners to modify the injunction has been fully practiced before the District Court. There were interlocutory hearings and arguments, a formal hearing with introduction of evidence by respondents, and voluminous briefs were filed. Following all of this, the District Court on August 7, 1958, rendered his considered opinion and judgment refusing to modify the injunction (89a-103a).

On appeal to the Court of Appeals for the Sixth Circuit, the District Court was affirmed in a *per curiam* opinion (Appendix A, pages 1a-4a, Petition for Writ of Certiorari).

## VI. REASONS FOR DENYING WRIT.

1. This Case Does Not Present an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The "important question" is: May an injunction issued by agreement of parties in connection with a "consent decree" be modified subsequently? The corollary follows: Under what circumstances may it be modified?

This Court has answered both questions, clearly and unequivocally, in *United States v. Swift & Co.*, 286 U. S. 106, 76 L. Ed. 999. Indeed all parties to this case recognize *Swift* as the leading authority on modification of injunctions.

Respondents concede that even a consent decree may be modified. Petitioners and respondents disagree on requirements for modification. This Court has pronounced the formula:

"Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

"We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court."  
(*United States v. Swift & Co.*, *supra*.)

The question here is not whether there is a right of modification, but whether petitioners in the District Court made a clear showing of grievous wrong, resulting from new and unforeseen conditions. The burden lay upon them to do so. *Ford Motor Company v. United States*, 335 U. S. 303, 93 L. Ed 24. They failed to meet this burden, as determined by the District Court and affirmed by the Court of Appeals. They introduced no evidence at the hearing below, either to meet the burden of showing a change of circumstances or in opposition to evidence adduced by respondents. They relied only on the amendment to the Railway Labor Act (45 U. S. C., SEC. 152, ELEVENTH) as warranting modification.

Actually, petitioners merely seek a review by this Court of a decision reached by the lower court on the record there made. The Court of Appeals for the Sixth Circuit reviewed this record and found no error in the order of the District Court in overruling petitioners' motion to modify the injunction. The Court of Appeals did not decide an important question of federal law not heretofore settled by this Court.

Petitioners seek refuge in SECTION 2, ELEVENTH, of the *Railway Labor Act* (45 U. S. C., SEC. 152, ELEVENTH), enacted subsequent to the entry of the original decree in this case, as the "new and unforeseen condition" which has evoked a "grievous wrong." They argue that the basis of the injunction was the *Railway Labor Act*. Therefore, the subsequent amendment of that Act entitles them to a modification of the injunction.

Respondents contend that the basis for the injunction was not the Railway Labor Act, but a voluntary and agreed settlement of the cause of action alleged in the original complaint. This original action sought monetary damages, declaratory relief and an injunction. In substance, the gist of the complaint (16a-41a) was that non-union employees of respondent railroad were denied certain employment benefits because they refused to join or maintain membership in defendant labor unions (petitioners here). Twenty-eight named plaintiffs settled claims for damages aggregating \$140,000.00 for a nominal sum of \$5,000.00 and a settlement of all issues in dispute, including the entry of a consent decree (70b-75b).

The decree provided that plaintiffs below, and the classes represented by them, should "from and after the date hereof" be entitled to certain employment benefits without regard to whether they joined or retained membership in defendant unions. The injunction prohibited defendant unions and defendant railroad from requiring membership in the unions as a condition precedent to enjoying certain employment benefits and "any other rights or benefits" which might arise out of or be in accordance with regularly adopted bargaining agreements then in effect between defendant unions and defendant railroad, or that might "*hereafter be in effect between the defendant Railroad and the defendant Unions in accordance with the Railway Labor Act*" (emphasis supplied) (41a-44a).

At that time (December 7, 1945) the Railway Labor Act did not permit a union shop. Therefore, it was not

necessary that the consent decree prohibit a union shop. But the parties agreed to that, not only in accordance with the Act as it then existed, but as it might thereafter exist.

The amendment of the Railway Labor Act to permit a union shop was not then unforeseen by the unions or by their astute counsel.

In 1943, two years before the entry of the decree in this case, petitioners attempted to obtain a union shop agreement upon respondent railroad in a proceeding before the National Railway Labor Panel Emergency Board in case No. A-1350. Mr. Willard H. McEwen was one of counsel for petitioners in that proceeding as well as one of counsel for petitioners in the original proceedings in this case. As shown in the Transcript of Proceedings of the National Railway Labor Panel Emergency Board, Book II, pages 1972-1981, at page 1980, counsel for petitioners in that case called upon the Board to recommend that the Railway Labor Act be amended to permit a union shop.

The "Supplemental Report To The President By The Emergency Board" appearing in Book II, *supra*, pages 2097-2167, at page 2106, contained notice served on respondent railroad by the cooperating railway labor organizations, including petitioners. This notice included a proposal for a union shop agreement. While the Board did not approve the proposal, nevertheless it is clearly seen that petitioners were making considerable effort under Section 10 of the Railway Labor Act to obtain a union shop agreement. It cannot be said, therefore, that two years later, when agreeing to the

judgment in this case, a subsequent amendment of the Railway Labor Act permitting a union shop agreement was unforeseen.

This Court has the authority to take judicial notice of a decision of the Emergency Board referred to above. *Bowles v. United States*, 319 U. S. 33, 87 L. Ed. 1194.

The injunction was consented to by the parties in order to protect and enforce their agreement that employment benefits would not in the future be made to depend on union membership. Such agreement was lawful when made. It is lawful today, for this Court has declared in *Railway Employees Department v. Hanson*, 351 U. S. 225, 100 L. Ed. 1112, that:

“The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements.”

The agreement of the parties, reached in a settlement of this case, became the decree of the trial court. The case was not submitted to the court for judgment except upon the agreement of the parties. Since the court did not determine the rights of the parties, the decree and injunction had to be based on something—the agreement of the parties that union membership would not be required for employment benefits, then or in the future.

Petitioners complain that a denial of their requested modification prevents the compulsory union shop the law now permits. They argue that unless the



decisions below be reversed, numerous unions on many railroads will lose their union shop agreements. Only the six shop craft unions (petitioners here) are involved and only union security of these unions on the Louisville and Nashville Railroad is affected. Moreover, the prevention of the union shop petitioners now covet on the respondent railroad's property does not result from the decisions below, but from the agreement petitioners voluntarily made with non-union employees of the Louisville and Nashville Railroad that union membership would not be a condition precedent to employment benefits. Since the amended Railway Labor Act does not *require* compulsory unionism, it is ineffective to change the agreement of the parties.

The injunction in this case does not protect rights which have ceased to exist. Those rights, agreed upon by the parties as establishing their relationship then and in the future, exist today. To the contrary notwithstanding the argument of petitioners, the injunction in this case is not the source of respondents' rights. That source is the agreement of the parties which became the judgment of the court.

Petitioners say their requested modification would not affect the basic prohibitions of the decree and injunctions. Such a conclusion is clearly illogical. The basic prohibition prevented petitioners and respondent railroad from requiring union membership in order to enjoy certain employment benefits. The modification desired by petitioners would permit a requirement of union membership to obtain or continue employment.

Modification must be consistent with the purpose of the original decree and calculated to effectuate and not thwart its basic purpose. *United States v. Radio Corporation of America*, 46 F. Supp. 654.

Petitioners rely on Rule 60(b) (5) of the Federal Rules of Civil Procedure, providing the court may relieve a party from a final judgment or order where it is no longer equitable that the judgment should have prospective application.

Petitioners have not made such a showing. Unrefuted evidence introduced by respondents in the trial below (1b-69b) clearly indicated bitterness and hostility between unions and non-union employees. It clearly disclosed abuse and mistreatment by union members of employees who worked during the 1955 strike, and threats of reprisals in the future if a union shop should come into existence. This evidence, as a whole, demonstrated that petitioners had not come into court with clean hands, that it would be inequitable to modify the injunction and that grievous wrong would result from modification, not from a refusal to modify.

The doctrine of "clean hands" is not a mere banality. It closes the doors of equity to one tainted with inequiteness or bad faith relative to the matter in which he seeks relief. *Precision Instrument Mfg. Company v. Automotive Maintenance Machinery Company*, 324 U. S. 806, 89 L. Ed 1381.

Modification or refusal to modify under Rule 60(b) is always within the sound discretion of the trial court and may be reversed only for abuse of that discretion. *Cole, et al. v. Fairview Development, Inc., et al.*, 226

F. 2d 175, and *Siberell v. United States*, 268 F. 2d 61. Petitioners have failed to show any abuse of discretion by the trial court. The Court of Appeals found none.

The provisions of Rule 60(b) were not intended to benefit the unsuccessful litigant after the time for appeal has expired. The procedure of the rule is not to be used as a substitute for appeal. A court is not permitted to act as a court of review under the guise of entertaining a motion to modify an original decree. *Morse-Starrett Products Company v. Steccone*, 205 F. 2d 244.

**2. The Decision of the Court of Appeals Is Not in Conflict With Applicable Decisions of This Court or of Other Courts of Appeal.**

Petitioners employ a clever argument in an effort to sustain their contention that the Court of Appeals' decision in this case is in conflict with applicable decisions of this Court and other Courts of Appeal. They state that the trial court construed the consent decree as a contract, which could not be modified, and that the Court of Appeals adopted the opinion of the District Court. Next they say that the court's authority to modify the injunction is unimpaired by the consent nature of the decree.

Their major premise is wrong. We concede their minor premise and disagree with their conclusion.

A reading of the opinion of the District Court will demonstrate the fallacy of petitioners' major premise. (See Appendix B, Petition For Writ of Certiorari.) The trial court did not construe the consent decree as

a contract. He referred to "the agreement which underlay the decree of December 7, 1945, . . . ." (Emphasis supplied.) (See page 15a, Appendix B of Petition.) But he did *not* hold that he had no power to modify because of such agreement. To the contrary, he held the court had authority to modify notwithstanding the consent decree:

"The Court agrees with counsel for the unions that there is continuing authority in the Court to modify the prospective application of a judgment of injunction. This is the teaching of the case of the *United States v. Swift & Company*, 286 U. S. 106, where the Supreme Court said there was no doubt that a court of equity has power to modify an injunction in adaptation to changed conditions though the Injunction was entered by consent" (Appendix B, page 16a, Petition).

Thus it is clear that the trial court's decision is not in conflict with *United States v. Swift & Co.*, *supra*; *Coca-Cola Co. v. Standard Bottling Co.*, 138 F. 2d 788, and *Chrysler Corporation v. United States*, 316 U. S. 566, cited by petitioners on page 16 of their Petition.

In view of the fact that the Amendment to the *Railway Labor Act* (45 U. S. C., Sec. 152, ELEVENTH), has been held by this Court to be permissive in *Railway Employees Department v. Hanson*, *supra*, the courts below did not err in refusing to recognize such amendment as sufficient ground for the requested modification. Nor are their decisions in conflict with the decisions cited by petitioners in their petition.

In *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U. S. 421, 18 How. 421, 15 L. Ed. 435 (page 17, Petition), the basis for the subsequent dissolution of the injunction was not the change of any statutory law in existence at the time the injunction was granted. It was merely a declaration by Congress that the bridge in question did not interfere with navigation, a fact which was true at the time the injunction was issued as well as at the time the injunction was dissolved. There was no change in factual circumstances. The bridge had never been an obstruction to navigation and the injunction should not have been issued in the first place.

In *Western Union Telegraph Co. v. International Brotherhood, Etc.*, 133 F. 2d 955 (page 18, Petition), the plaintiff obtained an injunction enjoining defendants from interfering, through a secondary boycott, with plaintiff's business. The Court of Appeals affirmed because it was believed that the conduct by the defendant was prohibited by the Sherman Act. Subsequently, the Norris-LaGuardia Act was passed. The defendants then filed their petition for modification of the injunction and the modification was granted by the lower court.

The Court of Appeals reversed with directions to the trial court to hear evidence to determine whether the defendants had mended their ways. A reading of the opinion clearly demonstrates that the right to modification was not based upon the passage of the Norris-LaGuardia Act but on the decisions of this Court, handed down since the injunction was issued

originally, holding that such activities as were enjoined were not in restraint of interstate commerce or violative of the Sherman Act. As the court said in its opinion:

“ . . . we are impelled to the conclusion under the circumstances here appearing, that the appellant cannot invoke the Sherman Act as a basis for injunctive relief.”

There again we find a situation where the acts complained of were not contrary to law, as the court had originally believed. It was not a change in any statutory law.

In *Luener v. Siegel*, 298 Pa. 487, 147 Atl. 699, 68 A. L. R. 1172 (page 18, Petition), there was involved the use and operation of a storage garage in an exclusively residential area. The court granted an injunction prohibiting the use of the garage as a public garage. Subsequently, the injunction was violated and the owners were adjudged in contempt. The defendants then sought a modification of the injunction permitting the use of the garage building for the storage of automobiles by tenants of nearby apartment houses. The court granted the modification, which was affirmed by the Pennsylvania Supreme Court.

However, the Pennsylvania court did not approve the modification of the injunction upon the ground of statutory change alone. The court, in the opinion, set out the formula for a modification of the injunction. We quote herein:

“The modification of a decree in a preventive injunction is inherent in the court which granted



it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, *and* (b) where the law, common or statutory, has changed, been modified or extended, *and* (c) where there is a change in the controlling facts on which the injunction rested." (Emphasis added.)

It should be noticed that the conjunction "and" appears between (a) and (b) and between (b) and (c) in the quotation above appearing. Thus we see that what the Pennsylvania court said is that modification of a decree *may be made* if the ends of justice would be served *and* where the law has been changed *and* where there is a change in the controlling facts on which the injunction rested. The single factor which more than anything else influenced the court in the *Ladner* case was a finding of a change in the controlling factual background, namely, that the residential district, in which so many apartment houses, hotels, schools and clubs were in use, was no longer so exclusively residential as to make the use of a storage garage a nuisance *per se*. Referring to the formula quoted above, the court said:

"It becomes apparent that the second and third reasons amply justify a modification of the decree, if there is nothing else to prevent it."

In *Santa Rita Oil Co. v. State Board of Equalization*, 112 Mont. 359, 116 P. 2d 1012, 136 A. L. R. 757 (page 19, Petition), there was involved an injunction issued by the Montana Supreme Court in an original

proceeding restraining the assumption, levy and collection of state taxes on oil and gas production under a lease of trust patent Indian land on the ground of interference with a federal instrumentality. Upon application by the defendant, the decree was modified.

Originally the court enjoined the assumption, levy and collection of the tax because the lessee was an instrumentality of the federal government and such taxes interfered with governmental functions. The original injunction was issued upon the basis of the decision by this Court in certain cases holding that lessees of Indian trust patent land were instrumentalities of the federal government. Subsequently, this Court overruled these decisions (which the Montana court had followed) holding that the tax upon the instrumentality did not under the circumstances constitute an interference with governmental functions.

In the *Santa Rita* opinion, the Montana court said:

"It is a federal question whether these taxes constitute such an interference with the federal instrumentality as to be void and that question is now answered by the federal courts in the negative. Their decision on the point is binding upon this court."

The point is, the original injunction was issued because this Court had then said that the taxes in question would interfere with the governmental function. When this Court later confessed its error and held that such taxes did not interfere with governmental function, the Montana court properly modified

its original injunction. In essence, this was a change of factual background or situation and not a mere change of law. Whether or not taxes interfered with governmental function, while decided as a matter of law, is nevertheless actually a matter of fact. When the interference no longer existed, equitable considerations would compel the modification of the injunction.

The case of *National Electric Service Corporation v. District 50, United Mine Workers of America* (Ky.), 279 S. W. 2d 808 (page 20, Petition), involved an injunction issued by the Harlan Circuit Court enjoining picketing for the purpose of coercing plaintiff's employees in joining the defendant union. The jurisdiction of the court was challenged upon the ground that the acts complained of constituted an unfair labor practice, of which the National Labor Relations Board had exclusive jurisdiction under the Labor Management Relations Act of 1957. The lower court overruled the objection and the Court of Appeals refused to dissolve the injunction.

Subsequently, this Court handed down a decision in *Garner v. Teamsters, Etc., Union*, 346 U. S. 485, 98 L. Ed. 228, which held that a state may not enjoin, under its own labor statute, conduct which had been made an unfair labor practice under the federal statutes. Following this decision, the defendant in the *National Electric Service Corporation* case moved the court to vacate the injunction, which motion was sustained by the lower court and affirmed by the Court of Appeals.

The crux of the case is that the Kentucky court had no jurisdiction to issue the injunction in the first place because the Labor Management Relations Act conferred exclusive jurisdiction on the National Labor Relations Board. There was no change in the Act subsequent to the issuing of the injunction. It remained the same. The basis for the vacation of the injunction was the pronouncement by this Court that the state court had no jurisdiction.

Petitioners argue that the amendment to the Railway Labor Act removed a pre-existing statutory prohibition. They say: "The plain import and effect of the statutory amendment was to make union security agreements lawful, as a matter of uniform national policy under the Railway Labor Act."

But petitioners and respondent railroad agreed that they would not require union security agreements as a condition to the enjoyment of benefits of employment by respondents and the classes represented by them. This agreement, as set forth in the consent decree, contained no provision for modification in the event of a subsequent amendment to the Railway Labor Act, although the unions prior to that time had sought a union shop agreement on respondent railroad's property and had urged that, if necessary, the Act be amended to permit union security. There has been no change in this agreement. As shown by the record in this case, there has been no change in the factual situation sufficient to warrant modification. The change in the Railway Labor Act does not alter, in

the slightest, the agreement of the parties (which became the decree of the court) or the controlling facts.

Furthermore, in his opinion the trial court correctly stated that the Railway Labor Act, at the time of the entry of the consent decree, *did not prohibit the railroad and the unions from agreeing that a union shop should not obtain*, and that there is *no such prohibition after the amendment* (page 16a, Appendix B, Petition).

That the parties did thus agree, there can be no doubt. The purpose of the agreement was to accomplish a settlement of the entire controversy, leaving nothing for the court to determine. Since there was no judicial determination, the court's decree necessarily had to spring from something to give it being. That "something" was the agreement of the parties. This is shown by the first sentence of the original decree (Appendix C, page 20a of Petition): "By consent and *agreement* of all parties to this action, it is ordered, adjudged and decreed as follows:" (Emphasis supplied.)

The trial court, following the decision in the *Hanson* case (Appendix B, page 15a, Petition), correctly decided ~~that~~ the change in the Railway Labor Act, being permissive only and ineffectual to change the agreement reached by the parties in the settlement of this controversy prior to the entry of the original decree, did not authorize a modification of the injunction. The court correctly concluded, following the *Swift* case, that the amendment to the Railway Labor Act alone did not amount to a "clear showing of

grievous wrong evoked by new and unforeseen conditions".

Petitioners argue that the court below relied upon evidence of hostility and bitterness arising out of a 1955 strike as supporting the conclusion that there had been no change in the circumstances which would support that modification. While the court did consider undenied evidence of hostility and bitterness arising out of the 1955 strike, he stated:

"The existence or non-existence of animosity, hostility or bitterness is not decisive of the question involved on the pending motion" (Appendix B, page 17a, Petition).

The court, however, did infer that because of the existence of this attitude on the part of the unions a modification of the injunction would require supervision of the conduct of the unions, which the court felt it should not undertake.

Petitioners argue that the evidence of the bitterness and hostility existing between union members and non-union members is irrelevant. With this we cannot agree. Such evidence demonstrates that the same ill will which existed between petitioners and respondents at the time of the filing of the original action continues today. If the injunction be modified and a union shop adopted, respondents who are the objects of ill will upon the part of the unions can be taken into membership and thereafter subjected to all manner of indignities and harassment, against which what remains of the decree and injunction would be powerless to protect.



The evidence heard in the trial below (1b-69b) cannot be read without obtaining an alarming picture of the threats of reprisal made to non-union men and union members who worked during the strike and who afterward were dropped from membership in the union.

The agreement between the unions and the carrier settling the strike contained a paragraph that there would be no prejudice or reprisal (58b). However, the Director of Personnel of respondent railroad testified that notwithstanding the no reprisal agreement he had received numerous complaints from many employees of abuses and indignities suffered because they worked during the 1955 strike, and that it was necessary, even at the time of the hearing, for the railroad to maintain special police (59b-60b). He further testified that about 40% of the railroad's employees in the shop crafts (the unions involved in this case) worked during the 1955 strike.

The injunction in this case gives to these employees the protection that the unions agreed to give them. A modification of the injunction would remove this protection and take from respondents and the classes represented by them that which they fought to obtain and that which petitioners agreed they might have. Such a modification would result in grievous wrong to respondents, not to petitioners. The modification would be inequitable. The equities to which respondents are entitled may only be preserved by a refusal to modify.

### 3. The Decisions Below Are in Accord With Applicable Decisions of This and Other Courts.

As has been stated hereinabove, the trial court followed the *Swift* case, *supra*, in denying modification (Appendix B, 16a, Petition). The formula adopted in the *Swift* case has been followed by many courts. A few examples are cited.

In *Western Union Telegraph Company v. International Brotherhood, Etc.*, 133 F. 2d 955, the Circuit Court reversed a modification of the injunction and remanded the case to the District Court to determine whether appellees had mended their ways and to inquire into their good faith and whether they came into court with clean hands. The opinion quoted from the *Swift* case as follows:

"In the consideration of this question it is well to remember the admonition of the court in the *Swift* case, *supra*, 286 U. S. 119, 52 S. Ct. 460, 76 L. Ed. 999, that nothing less than a clear showing of grievous wrong evoked by new and unforeseen condition should lead the court to change what was decreed after years of litigation."

In the case of *Walling, Etc. v. Harnischfeger*, 142 F. Supp. 202, a motion to ~~vocate~~ vacate and dissolve an injunction was denied because the record showed no substantial change except that the injunction had been complied with over a long period of time.

In *United States v. Radio Corporation of America*, 46 F. Supp. 654, the court said that modification must be consistent with the purpose of the original decrees

and calculated to effectuate and not thwart their basic purpose.

In *Morse-Starrett Products Company v. Steccóne*, 205 F. 2d 244, a motion to modify an injunction under Rule 60(b) was denied by the District Court, the denial being affirmed by the Court of Appeals. The opinion, citing the *Swift* case, held that there had been no adequate showing either of changed conditions making continuation of the injunction inequitable or that operation of the injunction could not have the intended effect.

In *Degenhart v. Harford*, 59 Ohio App. 552, 18 N. E. 2d 990, the court refused to modify an injunction notwithstanding a change in the zoning law permitting funeral homes within residential districts. The court found that the change in the law did not alter the factual circumstances that the operation of such home would be a nuisance.

The question of whether a change in law would warrant a modification of an injunction was squarely presented to the court in the case of *Sunbeam Corporation v. Charles Appliances, Inc.*, 119 F. Supp. 492, where a motion by a dealer to vacate an injunction issued under the Fair Trade Law was denied, notwithstanding that the consent decree was issued prior to the decision of this Court holding that the Miller-Tydings Act did not apply to non-signers to price-fixing agreements. The court said:

"The mere change in decisional law upon which a permanent injunction was granted, in and of itself, will not support the opening or modi-

fication of the decree. The circumstances and situation of the parties must so have changed as to make it equitable to do so. This indispensable ingredient is lacking in the case at bar."

It was lacking in the *Sunbeam* case because the McGuire Act was enacted to overcome the effect of the *Schwegmann* decision. In our case, the indispensable ingredient is lacking because the circumstances and situation of the parties have not changed so as to make it equitable to modify the decree. The change in the decisional law permitting negotiation for union security has not, of itself, brought about a change in the circumstances which either assure complete protection to all employees or which will guarantee in the future that certain employees will not be mistreated within the unions after becoming members thereof.

## VII. CONCLUSION.

To sum up, the injunction sought to be modified is part of a consent decree. The consent decree arose out of, and gave form and substance to, an agreement by the parties to this case settling all issues raised in the original complaint. The change in the Railway Labor Act merely permits but does not require union security agreements. Petitioners did not make a clear showing in the court below of a grievous wrong evoked by new and unforeseen conditions. They did not come into court with clean hands.

This case does not present an important question of federal law which has not been settled by this Court.

Petitioners merely seek a review of the discretion of the trial court, but they have been unable to show an abuse of that discretion.

The decisions below are not in conflict with applicable decisions of this Court and other Courts of Appeal. On the contrary, they are in accord with such decisions.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

*Marshall P. Eldred*

MARSHALL P. ELDRED,  
Board of Trade Building,  
Louisville, Kentucky,

*Attorney for Respondents  
Other Than Louisville  
and Nashville Railroad  
Company.*

*Of Counsel:*

BROWN AND ELDRED,  
Board of Trade Building,  
Louisville, Kentucky.

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IN THE  
**Supreme Court of the United States**

October Term, 1959

No. 258. 48

SYSTEM FEDERATION No. 91,  
RAILWAY EMPLOYEES' DEPARTMENT,  
AFL-CIO, Et AL.,

*Petitioners,*

VS.

O. W. WRIGHT, Et AL.,

*Respondents.*

**REPLY OF PETITIONERS TO  
BRIEFS OF RESPONDENTS**

ROBERT E. HOGAN  
Kentucky Home Life Building  
Louisville, Kentucky

RICHARD R. LYMAN  
741 National Bank Building  
Toledo 4, Ohio

*Attorneys for Petitioners*

*Of Counsel:*

SCHOENE & KRAMER  
255 K. Street, N.W.  
Washington 6, D. C.

M. L. HOLLAND, ROBBIE & HICKEY  
741 National Bank Building  
Toledo 4, Ohio



IN THE  
**Supreme Court of the United States**

October Term, 1959

No. 756.

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SYSTEM FEDERATION No. 91,  
RAILWAY EMPLOYEES' DEPARTMENT,  
AFL-CIO, ET AL.,

*Petitioners.*

vs.

O. V. WRIGHT, ET AL.,

*Respondents.*

---

**REPLY OF PETITIONERS TO  
BRIEFS OF RESPONDENTS**

---

The briefs of the Respondents are so artfully misleading as to the issues and ultimate facts presented in the case that we must attempt very briefly to put those matters back into perspective.

The injunctive order of the District Court below, as interpreted by the courts below, restrains the labor union Petitioners from getting, or even attempting to get, the limited amount of union security now permitted under Section 2, Eleventh of the Railway Labor Act, 64 Stat. 1238, 45 U.S.C. Section 152, Eleventh. At the time this injunctive order was formulated and issued, in 1945, union security in all degrees or amounts was prohibited in the railroad industry, and, thus, the prohibition of discrimination against the non-union employee Respondents on account of their failure or refusal to join one of the labor union Peti-

tioners was merely declaratory of the law as it then existed.

While we think that the injunctive order itself could, should, and was intended to have been read so as to forbid job discrimination based on non-union status in all present and future agreements, for so long as the same <sup>was</sup> proscribed under the Railway Labor Act, the courts below construed the 1945 order differently. They viewed it as also forbidding such discrimination in future collective bargaining agreements notwithstanding any future (and unforeseeable) changes in the law. Moreover, the courts below further held that even though a drastic change in the substantive federal law, partially permitting what was previously wholly forbidden, was subsequently enacted that that still was not a sufficient ground or justification for allowing the Petitioners to obtain a modification of the order which would have conformed it to the amendment in the law. The result of the litigation, therefore, was a denial of the motion for modification, which was absolutely unreasonable and highly prejudicial to the Petitioners, and which thwarted and subverted an important right specifically conferred upon them by Section 2, Eleventh, of the Railway Labor Act.

**I. The Denial of Petitioners' Motion for Modification of the 1945 Order Brings About Considerable Wrong and Hardship In That It Denies Petitioners Substantial Potential Financial Benefits.**

The fact that grievous wrong and extreme hardship to Petitioners will be brought about by denial of their requested modification of the 1945 injunctive order seems quite self evident; but judging from the Respondents' briefs, they do not comprehend that this is so.

Petitioners are deprived of the opportunity to obtain substantial revenues or financial benefits from the non-

union employee Respondents. As this court said in *Railway Employees' Dept., AFL v. Hanson*, 351 U.S. 225, 231, in tracing some of the legislative history of Section 2, Eleventh:

" . . . . While non-union members got the benefits of the collective bargaining of the unions, they bore 'no share of the cost of obtaining such benefits.' Id., at 4. As Senator Hill, who managed the bill on the floor of the Senate, said, 'The question in this instance is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions.' 96 Cong. Rec., Pt. 12, p. 16279."

The continuation in effect of the 1945 injunctive order deprives the Petitioners of the right to seek an agreement with Respondent Louisville and Nashville Railroad Company that would require the non-union employees to make a "fair contribution" to their support. Inasmuch as the Petitioners, as statutory bargaining representatives for the various crafts or classes of employees, must expend their time and money to protect the interests of those employees as well as their own members, this constitutes a very substantial hardship and wrong. Any attempt at the trial below to corroborate the above kind of hardship or to show additional hardship that might be incurred by individual members or officers of the Petitioners would have been superfluous.

## **II. The 1945 Injunctive Order Frustrates the Congressional Objective Behind Section 2, Eleventh.**

An important feature of this case is the considerable amount of public, as well as private, interest that is involved, although from reading the briefs of the Respondents one would certainly not be aware of it.

This court noted in *Railway Employees' Dept., AFL v.*

*Hanson*, 351 U.S. 225, 233-234, that the railroad union-shop legislation of Congress was entered into for the purpose of avoiding interruptions to commerce. The court said:

"Congress has authority to adopt all appropriate measures to 'facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.' *Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks*, 281 US 548, 570, 74 L. ed. 1034, 1046, 50 S. Ct. 427. These measures include provisions that will encourage the settlement of disputes 'by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them.' (*Virginian R. Co. v. System Federation*, R.E.D. 300 US 15, 548, 81 L. ed. 789, 800, 57 S. Ct. 592); and that will protect the employees against discrimination or coercion which would interfere with the free exercise of their right to self-organization and representation. *NLRB v. Jones & L. Steel Corp.* 301 US 1, 33, 81 L. ed. 893, 909, 57 S. Ct. 615, 108 ALR 1352. Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained.

"The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one.

• • •

"The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary."

The Congress felt that such union-shop agreements were not only equitable for the labor unions affected, but also desirable and beneficial for the railroad industry. Accordingly, in order to encourage their negotiation and util-

ization, Congress exercised its preemptive power to the fullest extent in enacting Section 2, Eleventh. State statutes and laws forbidding railroad union-shop agreements were superceded by Section 2, Eleventh, as well as federal statutes and laws; whereas, by contrast, in the Taft-Hartley Act, 61 Stat. 151, 29 U.S.C. Section 164 (b) state statutes or laws were allowed to prevail. See *Railway Employees' Dept., AFL v. Hanson*, supra at 232.

We believe the matter cannot be put more strongly than in the words of Mr. Justice Douglas when in *Railway Employees' Dept. AFL v. Hanson*, supra at 232, he wrote:

"A union agreement made pursuant to the Railway Labor Act has, therefore, the *imprimatur* of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal or vitiated by any provision of the laws of a state." (Emphasis supplied.)

The District Court below by refusing to modify the prior order in practical effect ~~has in 1958~~ specifically enjoined the Petitioners from utilizing a federal statute that was expressly designed by Congress for use by them and certain other railroad labor unions, and has ordered them to refrain from negotiating agreements which by virtue of the said statute would bear a federal government imprimatur. This plainly amounts to judicial interference with and frustration of federal legislation.

### **III. There Is No Private Agreement Which Bears on the Right of Petitioners to Seek Union Shop Agreements.**

As pointed out in our initial brief herein at pages 15 to 17 there is no private agreement between Respondents and Petitioners preventing the latter from exercising their statutory rights to attempt to obtain union-shop contracts from the Louisville and Nashville Railroad Company. The unilateral release executed by Respondents other than the Louisville and Nashville Railroad Company is certainly not

a contract between Petitioners and the Louisville and Nashville Railroad Company or between Petitioners and the other Respondents, although this seems to be implied by the other Respondents at page 13 of their brief. This is the only manifestation of any purported agreement that has been suggested or "discovered" by either of the Respondents.

If the consent decree itself is felt to be also a private agreement, we submit that the case of *United States v. Swift & Co.*, 286 U.S. 106, and the discussion at page 17 of our initial brief show that the consent by a party to a decree does not constitute an agreement by that party not to seek modification of the decree at some later date.

#### **IV. The Negotiation of a Union-Shop Agreement Could Not Subject the Employee Respondents to Indignities and Harrassment.**

Section 2, Eleventh, is a most carefully drawn piece of legislation. A union-shop agreement in conformity with Section 2, Eleventh, which is the only kind that Petitioners could validly negotiate with the Louisville and Nashville Railroad Company, cannot require any employee as a condition of his railroad employment to do more than apply for union membership and tender the initiation fee and the periodic dues and assessments required of all other members.

If, after applying therefor, an employee should be denied membership in the appropriate union for any reason other than failure to tender the dues, initiation fee, or assessments, or should he be suspended or expelled from membership for some reason other than that, he would be legally entitled to continue in his railroad employment as a non-member and to enjoy the same rights and benefits under the applicable collective bargaining agreement as union member employees in the same classifications.



Thus, it simply is not true that a union-shop agreement can harrass or harm the employee Respondents in the sense of being able to require them to submit to indignities or horrendous disciplinary measures. The only loss they would suffer, if such an agreement should be negotiated, would be financial, in that, by being required to join the appropriate union (if such unions would admit them to membership); they would be required to bear their fair share of the cost of collective bargaining. This is precisely what Congress feels they should do; and this incidentally would probably do more to ameliorate the alleged hostility between the union and non-union groups of employees than any other step that could be taken. This beneficial result was no doubt foreseen by Congress when, in its wisdom, it enacted Section 2, Eleventh.

On the other hand, the 1945 order of the court below which tends to perpetuate the union and non-union division of employees, can lead only to endless bitterness and hostility between employees in the opposing groups.

### CONCLUSION

For the reasons stated above, as well as those contained in our initial brief, we urge the court to grant the petition for a writ of certiorari.

Respectfully submitted,

ROBERT E. HOGAN  
Kentucky Home Life Building  
Louisville, Kentucky

*Of Counsel:*

SCHOENE & KRAMER  
165 K. Street, N.W.  
Washington 6, D. C.

MULHOLLAND, ROBIE & HICKEY  
741 National Bank Building  
Toledo 4, Ohio

RICHARD R. LYMAN  
741 National Bank Building  
Toledo 4, Ohio  
*Attorneys for Petitioners*

**PROOF OF SERVICE**

I, Richard R. Lyman, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of April, 1960, I served copies of the foregoing Reply of Petitioners to Briefs of Respondents on the several parties thereto as follows:

1. On Respondent Louisville and Nashville Railroad Company by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, as follows:

John P. Sandidge,  
Woodward, Hobson & Fulton  
1805 Kentucky Home Life Building  
Louisville, Kentucky.

H. G. Breetz,  
Louisville and Nashville Office Building  
Ninth & Broadway  
Louisville, Kentucky.

2. On Respondents other than Louisville and Nashville Railroad Company by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to their attorney of record, as follows:

Marshall P. Eldred,  
Brown & Eldred,  
Board of Trade Building,  
Louisville 2, Kentucky.

Richard R. Lyman

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1955

No. 756

SYSTEM FEDERATION No. 99 RAILWAY EMPLOYEES  
DEPARTMENT, AFL-CIO, et al.,

*Petitioners*

VS.

O. A. WOOD, et al.,

*Respondents*

On Writ of Certiorari to the United States Court of Appeals  
for the Sixth Circuit.

**BRIEF FOR PETITIONERS**

REINHARD R. LYMAN

741 National Bank Building  
Toledo 4, Ohio

ROBERT E. HOGAN

Kentucky Home Life Building  
Louisville, Kentucky

*Attorneys for Petitioners*

*of Counsel:*

STUBBINS & KRAMER

1625 K Street, N.W.  
Washington 6, D.C.

McHOLLAND, ROBEY & HURLEY

741 National Bank Building  
Toledo 4, Ohio

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959

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**No. 756**

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SYSTEM FEDERATION No. 91 RAILWAY EMPLOYEES'  
DEPARTMENT, AFL-CIO, et al.,

*Petitioners,*

vs.

O. V. WRIGHT, et al.,

*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Sixth Circuit.

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**BRIEF FOR PETITIONERS**

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**OPINIONS BELOW**

The opinion of the District Court (R. 69) is reported at 165 F. Supp. 443, and the opinion of the Court of Appeals (R. 150) at 272 F. (2d) 56. The original unreported consent decree of injunction (entered December 7, 1945), modification of which is sought herein, appears at page 36 of the record herein.

**JURISDICTION**

The judgment of the Court of Appeals (R. 149) was entered December 5, 1959. The jurisdiction of this Court was invoked under Section 1254(1) of Title 28, United

States Code, and the petition for writ of certiorari was granted by the Court on April 18, 1960 (R. 153).

### STATUTE INVOLVED

Section 2, Eleventh of the Railway Labor Act, as amended by the Act of January 10, 1951, c. 1220, 64 Stat. 1238, U.S.C. Tit. 45 Sec. 152, Eleventh:

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initia-

tion fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in Section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership

from one organization to another organization admitting to membership employees of a craft or class in any of said services.

“(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.”

### QUESTIONS PRESENTED

1. Did the 1951 Amendments to the Railway Labor Act entitle statutory bargaining representatives, previously enjoined from discriminating against non-union employees, to modification of the injunction so as to permit negotiation of union security agreements expressly authorized by such amendments?

2. Were such bargaining representatives precluded from obtaining modification of the injunction by the consent nature of the original decree?

3. May a court refuse to permit negotiation of union security agreements authorized by Congress, on the basis of bitterness and hostility between union and non-union employees resulting from strike-breaking activities of the latter, and having no connection with the injunction sought to be modified?

### STATEMENT OF THE CASE

Petitioners, System Federation No. 91 of the Railway Employees' Department, AFL-CIO, and a group of affiliated international and local labor organizations, originally defendants below, seek review of a judgment affirming the District Court's denial of their motion to modify a decree of injunction entered December 7, 1945. The requested modification would remove from the scope of the



injunction's prohibitions conduct which, while unlawful when the decree was entered, has subsequently been made lawful by Act of Congress.

The action originated on July 16, 1945, when O. V. Wright and twenty-seven other named plaintiffs brought suit against respondent Railroad, labor organizations representing the involved crafts or classes of its employees, and their subordinate lodges or local unions on the property of respondent Railroad, claiming that they had been subjected to unlawful discrimination in violation of the Railway Labor Act (45 U.S.C., Sec. 151 et seq.). Plaintiffs were not members of the defendant labor organizations, and the gist of the complaint (R. 15-35) was that the defendants had discriminated against non-members of the organizations in matters of promotion, seniority, overtime, leaves of absence, and other employment benefits under the applicable collective bargaining agreements, because of such non-membership. The complaint prayed for a declaratory judgment establishing the right of plaintiffs and other non-members of the defendant labor organizations, under the Railway Labor Act, to equal treatment with other employees in the enjoyment of such benefits of their employment; an injunction prohibiting defendants from future discriminations of the sort complained of; and damages of \$5,000 each for the named plaintiffs, for alleged past discrimination (R. 32-35.)

• Thereafter, defendants consented to a declaratory judgment and injunction, entered by the court on December 7, 1945 (R. 36), purporting to declare the rights, duties and obligations of the parties under the Railway Labor Act and agreements negotiated pursuant thereto, and enjoining defendants from requiring plaintiffs and the classes represented by them to join or retain membership in any of the defendant labor organizations as a condition of enjoyment of rights and benefits under the collective

bargaining agreements, denying them such rights and benefits because of their failure or refusal to join or to retain their membership, or discriminating against them in the application of the bargaining agreements because of failure or refusal to join or retain such membership. The claims of the twenty-eight named plaintiffs for monetary damages were separately settled and not covered by the decree.

In the decree the court retained control of the action for the purpose of entering such further orders as might be deemed necessary or proper. (R. 38.)

At the time of institution of this action, and entry of the foregoing decree and injunction, the Railway Labor Act, and particularly Section 2, Fourth and Fifth thereof, made it unlawful for carriers to interfere in any way with the organization of their employees, or to coerce or compel their employees to join or remain or not to join or remain members of any labor organization, and such prohibitions were generally construed as creating an "open shop" in the railroad industry, and making unlawful closed shop, union shop or other forms of union security agreements.

However, by Act of January 10, 1951 (64 Stat. 1238; 45 U.S.C. 152, Eleventh) the Congress of the United States amended the Railway Labor Act to permit, within defined limits, the making of union security agreements by carriers subject to the Act. Negotiation, and efforts to negotiate, union security agreements pursuant to such amendment resulted in litigation challenging their legality and the constitutionality of the amendment itself, and it was not until May 21, 1956, that an authoritative ruling was obtained from this Court, in *Railway Employees' Department, AFL v. Hanson*, 351 U.S. 225, upholding the validity of the amendment and agreements negotiated pursuant thereto.

Subsequently the moving defendants, and other labor organizations representing different crafts and classes of defendant Railroad's employees represented by them under the Railway Labor Act, upon seeking a union security agreement of the sort authorized by Section 2, Eleventh, of the Act as amended, were met with a refusal by the Railroad to negotiate such agreement or agreements for the asserted reason that it feared that to do so would subject it and the defendant labor organizations to charges of contempt for violation of the injunction of December 7, 1945.

Pursuant to notice served on counsel of record for defendant Railroad and the original plaintiffs, O. V. Wright, et al., on July 2, 1957, a motion was filed by the System Federation and affiliated international unions, petitioners here, pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure, seeking modification of said decree of injunction of December 7, 1945, by adding to and incorporating therein a proviso to the effect that it should not operate to prohibit defendants, or any of them, from negotiating, entering into, or applying and enforcing, any agreement or agreements authorized by Section 2, Eleventh of the Railway Labor Act, as amended January 10, 1951. (R. 39-43.)

Responses opposing the requested modification of the injunction were filed on behalf of some of the original plaintiffs (R. 47 and 56), the respondent Railroad (R. 51), and additional individual employees whose intervention was allowed on February 3, 1958. (R. 61, 68.) Following additional hearings, entries of appearance on behalf of additional labor organization defendants, and the filing of numerous briefs (R. 11-14), the District Court, under date of August 7, 1958, issued its memorandum opinion (R. 69) refusing to modify the injunction.

The District Court, while conceding that it had the

authority to grant the requested modification of the injunction, refused to do so for the stated reason that the amendment of the Railway Labor Act, in 1951, did not constitute a sufficient change in circumstances to authorize a modification of the decree. Although stating that it was "not decisive of the question involved on the pending motion", the District Court recognized the existence of bitterness and hostility between union and non-union employees, as well as union members who had worked during a strike in 1955, as a factor in its refusal to modify the 1945 injunction. And finally, the District Court took the view that the original injunction, being a consent decree, would be construed as encompassing an agreement that in the future there would never be any requirement of union membership as a condition of employment, and that hence it would leave the parties "as they agreed to be and to remain".

In its per curiam opinion (R. 150) the Court of Appeals affirmed the order denying modification of the injunction, for the reasons set forth in the District Court's opinion. Like the District Court, it placed large emphasis (though without any showing of relevance) upon hostility and bitterness attending strikebreaking activities in the 1955 strike. And it similarly construed the consent decree of injunction as a contract, saying "the parties therein, by their consent thereto, provided that no such requirement of union membership should thereafter be in effect in any bargaining agreement under the Act".

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Western District of Kentucky, was alleged by the original plaintiffs to be "the Act of Congress of June 21, 1934, 48 Stat. 1185, 45 U.S.C.A., ch. 8, being an act to regulate interstate commerce; 28 U.S.C.A., sec. 41 (8); Federal Rules of Civil Pro-

<sup>1</sup>The Railway Labor Act.

cedure, Rule 57, 28 U.S.C.A., sec. 723; 28 U.S.C.A., sec. 400". (R. 18.)

### SUMMARY OF ARGUMENT

The injunction sought to be modified was part of a judgment entered in 1945 declaring and protecting rights under the Railway Labor Act as it then existed. Amendment of the statute in 1951 to permit negotiation of union security agreements entitled petitioners to a *pro tanto* modification of the injunction, so as to eliminate the prohibition against conduct now expressly authorized by Congress. While injunctions are issued to protect legal rights, they are not the source of the rights. Where as here the source of the right lay in the statute, subsequent legislative action eliminating the right entitled petitioners to modification as a matter of law. The trial court possessed no judicial discretion to deny petitioners benefits which Congress had said they should be permitted to enjoy, or to perpetuate injunctive protection of a right which, by virtue of the change in the law, had ceased to exist.

It is well established that the right to obtain modification of an injunction is not affected by the consent nature of the decree. It is still to be treated as a judicial act and not a contract. The Railway Labor Act was the source both of the right protected by the decree and the jurisdiction to issue it; and the possibility of subsequent modification or termination of the injunction, should the right be terminated and jurisdiction withdrawn by a change in the law, was inherent in the consent. The courts below erred in construing the conduct of the parties in agreeing to the entry of the decree as an independent contractual undertaking warranting perpetuation of the injunction after the statutory right had been extinguished by Congressional action. If the reasoning of the courts below were to pre-

vail, all consent decrees of injunction would be immune from modification, on the theory of an implied contract compelling the courts to leave the parties "as they agreed to be and to remain".

The courts below erred in predicating their refusal to modify the injunction in part, at least, upon improperly received evidence of bitterness and hostility occasioned by strike-breaking activities of some of respondent carrier's employees in 1955, having no connection with the injunction and no relevance to the question of whether it should be modified to permit negotiation of union security agreements. Congress carefully prescribed the conditions upon which union security agreements might be maintained, effectively eliminating any possibility of their use as instruments of discrimination. No substantive rights of the respondents would be affected by the requested modification. On the other hand, perpetuation of the injunction would subject petitioners to punishment for seeking an objective specifically authorized by Congress; would deny them the substantial benefits of union security agreements with attendant financial contributions from plaintiffs and others who for years have used the injunction as a shield for their "free rider" status; and would offer no hope for amelioration of the bitterness and hostility which respondents say has existed, between union and non-union employees, under the aegis of the 1945 injunction.

## ARGUMENT

- I. The 1951 Amendments to the Railway Labor Act entitled petitioners, previously enjoined from discriminating against non-union employees, to modification of the injunction so as to permit negotiation of union security agreements expressly authorized by such amendments.

Nine years ago the Congress of the United States, in



enacting Section 2, Eleventh, of the Railway Labor Act (45 U.S.C., Sec. 152 Eleventh) provided that labor organizations representing employees in the railroad industry "shall be permitted" to negotiate union security agreements. After much litigation the validity of that enactment was established by this Court in *Railway Employees' Department, A.F.L. v. Hanson*, 351 U.S. 225. Yet today representatives of the entire shop-craft group of employees of one of the nation's largest Class I Railroads<sup>2</sup> stand perpetually enjoined, in the light of the decisions below, from seeking the benefits of union security agreements. The effect of the denial of the requested modification of the 1945 injunction is to maintain an everlasting prohibition against what Congress has said shall be permitted; to perpetuate a restraint against conduct now and for the last nine years completely lawful; to maintain in effect a remedy for a right which has become non-existent; and to subject labor organizations to the injunctive processes of the federal courts long after the withdrawal of jurisdiction to grant such an injunction.<sup>3</sup>

Prior to 1951 there were a number of instances in which injunctions were issued to compel compliance by statutory bargaining representatives in the railroad industry with the principles enunciated by this Court in 1944 in *Steele v. Louisville & Nashville Railroad Company*, 323 U.S. 192, and *Tunstall v. Brotherhood of Locomotive F. &*

<sup>2</sup>On March 1, 1957, the Interstate Commerce Commission in *Finance Docket No. 18845, Louisville & Nashville Railroad Company, et al., Merger, etc.*, approved the acquisition of the properties of the Nashville, Chattanooga & St. Louis Railway by the Louisville and Nashville Railroad Company through a merger of the two railroads. (295 I.C.C. 457).

<sup>3</sup>The trial court's jurisdiction to grant the 1945 injunction depended solely on the Railway Labor Act. It is elementary that jurisdiction could not be conferred by the consent nature of the decree, or any agreement of the parties. In *Graham v. Brotherhood of L.F. & E.*, 338 U.S. 232, this Court made it clear that the Norris-LaGuardia Act (29 U.S.C., Sec. 101 et seq.) is avoided only when the court is called upon "to compel compliance with positive mandates of the Railway Labor Act" (p. 237). Clearly, in view of the 1951 amendments to the Railway Labor Act, there would be no jurisdiction in a federal court to enjoin union security agreements which the amendments say shall be permitted.

*E.*, 323 U.S. 210.<sup>4</sup> Should the decision below be permitted to stand, they will furnish a basis for depriving numerous organizations, representing employees in various crafts on many railroads, of the benefits of union security agreements. The likelihood of such a development is testified to by the multitude of suits since 1951 involving other aspects of union security agreements in the railroad industry.

Although the specific question of the effect of the 1951 amendments to the Railway Labor Act upon such previously issued injunctions, and the right to obtain modification thereof to conform to the change in the parties' rights and obligations under the statute, has not been passed on by this Court, it is clear that the decisions below are plainly in conflict with basic principles governing injunctions and their modification.

The decree that was entered in 1945 was a judgment defining the then existing rights and obligations of the parties under the Railway Labor Act, and enjoining observance of those statutory duties. Those matters are of course subject to legislative change, and it may not be assumed from the consent nature of the decree that the parties or the court contemplated the establishment in perpetuity of a set of jural relationships independent of and immune from future legislative action.

The holding of the court below that a change in the statute did not justify a *pro tanto* modification of the injunction, removing from the scope of its protection rights which had ceased to exist, is inconsistent with one of the most basic principles to be considered in these cases—i.e., that an injunction is simply a remedy for the protection of a legal right, but is not the *source* of the right.

<sup>4</sup>It is apparent that these cases supplied the pattern for the delineation of statutory rights and obligations set forth in the December 7, 1945, consent decree of injunction herein. (R. 36.)

“An injunction decree *does not create a right*; it is a remedy protective of a right; a party obtaining the injunction *does not obtain a vested right*; and accordingly its *prospective* features are subject to vacation or modification when warranted by equitable principles, whether the decree was entered in a contested case, as the result of a default, or by consent of the parties.” (Moore’s Federal Practice, Second Edition, Vol. 7, p. 285-286.)

From this basic concept, it logically follows that when the legal right which formed the basis for the injunction is changed or terminated, the injunction should be accordingly modified or vacated, insofar as its future application is concerned. Otherwise we would be faced with the situation of a continuing remedy for the protection of a non-existent right.

What is sought, of course, is simply the removal, from the scope of the December 7, 1945, injunction, of any prohibition against the negotiation and application of a union security agreement or agreements, as authorized by the 1951 amendments to the Railway Labor Act. Should the injunction be so modified, and should respondent Railroad enter into such an agreement with the labor organizations representing the involved crafts of its employees, then the plaintiffs and other employees in those crafts would be required, as a condition of continued employment, to become members of the labor organization representing their craft, “*Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining member-*

ship." (Railway Labor Act, Sec. 2 Eleventh (a); emphasis supplied.)

The proposed modification would *not* vacate or terminate the injunction, but would only remove the prohibition indicated.

It would *not* affect the basic prohibitions against the kind of alleged discriminations which prompted the institution of this action in 1945 — i.e., hostile discrimination against particular employees or groups of employees with respect to promotion, seniority, overtime, and other rights and benefits under the collective bargaining agreements.

Being simply the removal of a prohibition, the modification would *not* operate to decide any future questions that might be raised concerning the validity of particular union security agreements that may be negotiated, authority to negotiate them, their proper interpretation and application, or questions of the interpretation and validity of the 1951 amendments to the Railway Labor Act itself. Respondent Railroad and its employees would be left free to raise such questions or disputes unhampered by the requested modification.

Specifically, the motion to modify the injunction was filed under Rule 60 (b) (5) of the Federal Rules of Civil Procedure, which provides in part as follows:

*"Rule 60. Relief From Judgment or Order.*

.....

*"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . . (5) the judgment has been satisfied,*

released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; . . ." (Emphasis supplied.)

Even without the authority thus expressly provided, it is well established that as a matter of general equity principles injunctions having continuing effect are subject to being vacated or modified, insofar as their future application is concerned, to conform to changed circumstances. As Professor Moore states, in discussing the effect of the present Rule 60 (b) :

"Prior to the Federal Rules it was settled that a court of equity had power to vacate or modify a final decree that had prospective application where it was no longer equitable that the decree should have such prospective effect. As Justice Cardozo stated in *United States v. Swift & Co.* a 'continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.' This could be justified on inherent power, on principles underlying a bill of review, or on a combination of these principles. Except insofar as principles underlying a bill of review would support relief, the first saving clause of original Rules 60 (b) was inept in preserving the power; but since the power was clearly rooted in practical good sense courts continued to exercise it under Rule 60 (b). And amended Rule 60 (b) now states that one of the reasons for granting relief from a final judgment is that 'it is no longer equitable that the judgment should have prospective application' ". (Moore's Federal Practice, Second Edition, Vol. 7, p. 90-91.)

Although in this case the trial court's decree of December 7, 1945, reserved continuing control of the action, power to modify the decree would be present even without such reservation. As stated in *United States v. Swift & Co.*, 286 U.S. 106, 114:

"Power to modify the decree was reserved by its very terms, \* . . . If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."

As we have pointed out, the modification sought here relates strictly to the prospective application of the injunction, and as such was clearly within the power of the court under the Rule invoked as well as accepted principles of equity jurisprudence.

The purpose of the original injunction was to protect rights which plaintiffs enjoyed by virtue of the Railway Labor Act. The statute was the sole source of those rights. Modification of the injunction to conform the scope of its protection to the scope of plaintiffs' continuing statutory rights thus does not thwart, but continues to effectuate, the only purpose of the original decree.

While it is generally said that the granting or denial of a motion to modify or dissolve an injunction rests within the discretion of the trial court, and its action will not be disturbed on appeal absent an abuse of that discretion, the rule is different where, as here, there is no dispute as to the facts and the ruling involved only questions of law and their application to the conceded facts. Here there was no factual issue for the District Court to resolve, and no question of burden of proof, since petitioners' motion was predicated entirely upon the amendment of the controlling statute, the Railway Labor Act. As stated at 28 Am. Jur., Injunctions, Sec. 328, p. 501:

" . . . If the facts are such that solely questions of law are presented, the trial court's action is reviewable, and should be reviewed on appeal. *Differently stated, the trial court abuses its discretion where it fails or refuses to properly apply the law to conceded or undisputed facts.* A proper discretion does not



include the misapplication of the law to the facts, and where that is the case, the order appealed from will be reversed." (Emphasis supplied.)

As noted in the foregoing discussion of basic principles applicable to the modification of injunctions, the courts below clearly erred in refusing to recognize the amendment of the Railway Labor Act as sufficient ground for the requested modification.

Such refusal is clearly in conflict with the decision of this Court in *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, which recognizes a change in the law as sufficient basis for modification of an injunction.

The Court of Appeals for the Seventh Circuit similarly recognized that "the injunction will be vacated or modified where the law has been changed making acts enjoined legal". *Western Union Tel. Co. v. International Brotherhood, etc.*, 133 F. (2d) 955, 957.

One of the leading cases pertinent to our discussion, and which was cited by this Court as authority for its decision in *United States v. Swift & Co.*, 286 U.S. 106, is *Ladner v. Siegel*, 298 Pa. 487, 147 Atl. 699, 68 A.L.R. 1172.

There the court specifically listed a change in the law, either statutory or common, as one of the bases for modification of an injunction, and emphasized the point that injunctions do not create rights, saying:

"The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, and (b) where the law, common or statutory has changed, been modified or extended, and

(c) where there is a change in the controlling facts on which the injunction rested.

"... An injunction decree does not create a right; it protects the rights of the owner to the enjoyment of his property from injurious interference by the uses of other land. The right protected is an attribute of property existing through the application of common-law principles. *A decree preventing its injury does not give to the complaining party a perpetual or vested right either in the remedy, the law governing the order, or the effect of it.* He is not entitled to the same measure of protection at all times and under all circumstances. A decree protecting a property right is given subject to the rules governing modification, suspension, or dissolution of an injunction. The decree is an ambulatory one, and marches along with time affected by the nature of the proceeding." (Emphasis supplied.)

Another leading case, involving modification of an injunction to conform to a change in the law upon which it was based, is *Santa Rita Oil Co. v. State Board of Equalization*, 112 Mont. 359, 116 P. (2d) 1012, 136 A.L.R. 757. There the court modified an injunction to conform to a change in judicial law, resulting from this Court's overruling of its earlier precedents. The following language from the court's decision is particularly relevant here. Following extensive quotation from *Ladner v. Siegel*, *supra*, the court said:

"This rule is well established and many of the leading authorities will be found in the note in A.L.R. above referred to and in 28 Am. Jur. p. 494, §323. Among the leading cases are *United States v. Swift & Co.*, 286 U.S. 106, 52 S. Ct. 460, 462, 76 L. Ed. 999, in which the court said that by granting a permanent injunction, 'a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong;' *Milk Wagon*

*Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, 557, 85 L. Ed. 836, 132 ALR 1200, in which the court said: "The injunction which we sustain is 'permanent' only for the temporary period for which it may last . . . Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted;" and *Glenn v. Field Packing Co.* 290 U.S. 177, 54 S. Ct. 138, 78 L. Ed. 252, in which the court held that a modification is warranted by a change in the law by judicial decision. The latter point hardly requires citation of authority, for *obviously it is not equitable to continue to restrain a party from actions no longer unlawful whether the change in law has come about through new legislative enactment or through an authoritative change in judicial construction by the courts.* However the change may have come about, it is obviously not within the theory of a government of uniform laws conferring equal rights on all, as distinguished from a government of men conferring unequal privileges on some, that the state authorities should be further prevented from the enforcement of tax laws against this taxpayer and not against others similarly situated . . ." (Emphasis supplied.)

" . . . Thus an adjudication that plaintiff was then entitled under the existing laws and facts to an injunction does not amount to an adjudication that it will always be entitled to it, regardless of changing circumstances or laws nor does it tie the hands of the equity court so as to prevent it from doing equity in the future. In other words, to say that the question may not be reopened for the purpose of determining whether the injunction should have been granted in the first instance is not to say that it may not be reopened for the determination of the question whether equity now demands that the injunction be modified, vacated, or continued further . . ."

Additional authorities supporting modification of an injunction to conform to a subsequent change in the law are discussed in the annotation following the *Santa Rita*

*Oil Co.* case, at 136 A.L.R. 765. See also the recent Kentucky decision in *National Electric Service Corporation v. D. 50 United Mineworkers*, 279 S.W. (2d) 808 (1955) where the court construed Kentucky's Civil Rule 60.02, which is the same as Rule 60 (b) of the Federal Rules, and set aside a judgment creating a permanent injunction because of a subsequent change in the law, saying:

"Secondly, in addition to the authority of the above subsection of CR 60.02, the trial court may well have acted under an established principle governing injunctions. An injunction, whether permanent or temporary, is an equitable process that results only from the extraordinary powers of the chancellor, and is a continuing process over which the equity court necessarily retains jurisdiction in order to do equity. This includes power to modify or vacate it, if the law has changed or present considerations of equity demand it. See *Santa Rita Oil Co. v. State Board of Equalization*, 112 Mont. 359, 116 P. 2d 1012, 136 ALR 757; and the cases assembled in annotation in 136 ALR; *United States v. Swift*, 286 U.S. 106, 52 S. Ct. 460, 75 L. Ed. 999; *Ladner v. Siegel*, 298 Pa. 487, 148 A. 699, 68 ALR 1172.

"The injunction, as such, serves to protect the status quo in respect to property rights under existing law and facts. *Kelly v. Earle*, 325 Pa. 337, 190 A. 140. A change in either serves as sufficient ground for modification or vacation of the original judgment—not by reason of the void or voidable aspect of the original decree—but through the chancellor's inherent power to correct that which it is no longer equitable to enforce.

"In the case at bar, the trial court stated in its opinion the injunction was issued on the sole ground that the picketing had the unlawful purpose of coercing the employer to compel its eligible employees to become members of the union. The *Garner* case removed the power to use an injunction based on that

ground. The Chancellor, in exercise of his inherent power, was well within his right and duty in setting aside the injunction because of the subsequent change in law." (Emphasis supplied.)

In refusing to modify the 1945 injunction, the courts below commented that the 1951 amendments to the Railway Labor Act were only "permissive", in that they did not require union security agreements, and apparently concluded therefrom that the change in the law left it optional with the courts whether to continue the injunctive prohibition of such agreements.

There has, of course, never been any question here of asking the court to require the execution of a union shop agreement. But the amendment of the Act very definitely removed a pre-existing statutory prohibition, and modification of the injunction is here sought to conform to that change in the statute.

The language used by Congress was positive. It stated that union shop agreements of the type described "shall be permitted . . . Notwithstanding any other provision of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State". When Congress says something "shall be permitted", we think it is clear that the intent is that it shall not be prohibited. The plain import and effect of the statutory amendment was to make union security agreements lawful, as a matter of uniform national policy under the Railway Labor Act.

Summing up, we have in this case a judgment based solely on plaintiffs' rights under the Railway Labor Act as it was in 1945 with a declaration as to what those rights were and an injunction protecting them. The act is now changed, with respect to the subject matter of the pending

motion to modify the injunction. In its original form the injunction protects rights no longer in existence, and its enforcement would mete out punishment for acts no longer unlawful, but expressly authorized by Act of Congress.

We submit that it is inequitable to continue the prospective application of a decree protecting plaintiffs in matters in which they no longer have any substantive legal right to protection, and prohibiting to defendants, under pain of contempt proceedings, conduct in which they have an express, affirmative statutory right to engage.

The courts below clearly erred in holding, contrary to the decision of this and other courts, that the change in the law with which we are here concerned would not support modification of the injunction in the absence of some other change in the "facts." We can conceive of no change more basic, or compelling of a modification of an injunction in its future application, than a change in the law which completely undercuts the source of the right previously protected. When the injunction was issued, railroad union security agreements were prohibited by statute. Today they are expressly approved, the statute as amended stating that they "*shall be permitted*", and they could not now be enjoined. No change in the factual relationships of the parties could be as decisive.

**II. Petitioners were not precluded from obtaining modification of the injunction by the consent nature of the original decree.**

The courts below clearly erred in construing the consent decree of injunction as a contract, and denying modification for that reason. That such was the construction accorded the decree is evident from the following language in the opinion of the Court of Appeals:



"... When the injunction was issued, the parties therein, *by their consent thereto*, provided that no such requirement of union membership should thereafter be in effect in any bargaining agreement under the Act. The Amendment of 1951, subsequent to the issuance of the injunction, did no more, the court held, than make negotiations for a union shop permissive, and did not nullify *the agreement or the injunction* issued ..." (R. 152; emphasis supplied.)<sup>5</sup>

On the contrary, it is well established that the court's authority to modify the injunction was unimpaired by the fact that it was entered by consent of the parties. This was squarely and unequivocally stated by this Court in *United States v. Swift & Co.*, 286 U.S. 106, as follows:

"... The result is all one whether the decree has been entered after litigation or by consent (*American Press, Assoc. v. United States*, L.R.A. 1918A, 1039, 157 C.C.A. 387, 245 Fed. 91). In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. *We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act.* A different view would not help them, for they were not parties to the contract, if any there was. All the parties to the consent decree concede the jurisdiction of the court to change it. The interveners gain nothing from the fact that the decree was a contract as to others, if it was not one as to them. But in truth what was then adjudged

<sup>5</sup>The District Court's opinion might indicate that it thought that in addition to the consent decree, there was a separate, "side" agreement not to ever negotiate for a union shop. Indeed, respondents' argument, in the courts below as well as in their briefs filed herein in opposition to the petition for a writ of certiorari, are calculated to convey that impression. The Court will, however, search the record in vain for one iota of evidence of the existence of such a contract. The only "agreement" was the simple act of consenting to the entry of the decree of injunction of December 7, 1945. Indeed, careful examination of respondents' briefs in opposition to certiorari will reveal that it is the consent decree itself which they rely on as constituting an agreement. Thus, respondent carrier's brief, at p. 17, states that "*In the consent decree*, the parties agreed ..."; and in the brief for other respondents, at p. 23, they refer to "This agreement, as set forth in the consent decree ..."

was not a contract as to any one. *The consent is to be read as directed towards events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.*" (Emphasis supplied.)

In *Coca-Cola Co. v. Standard Bottling Co.*, 138 F. (2d) 788, the Court of Appeals for the Tenth Circuit stated:

"We know of no case which holds that a consent decree imposing a continuing injunction deprives the court of its supervisory jurisdiction in the matter."

See also *Chrysler Corp. v. United States*, 316 U.S. 556, at 567.

Aside from the fact, as we have pointed out, that no agreement of the parties could support jurisdiction to grant the injunction, it is clear that the court below erred in construing the consent decree as a contract rather than a judicial act. If the act of consenting to the entry of a decree of injunction were to be accorded the effect thus attached to it by the courts below, then all consent decrees would necessarily be immune from modification. But as this Court recognized in the *Swift & Co.* case, quoted *supra*, such is not the law, and a consent decree is not "an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."

The lower courts' error in treating the consent decree as a contract comes full circle with the argument of respondents other than the carrier (brief in opposition, p. 11) that the basis for the original decree of injunction was not the Railway Labor Act but the contract. In other words, they urge that the injunction constituted a contract, and that the contract thus arrived at constituted the source of the right protected by the injunction.

The fact is that the complaint herein by its terms was predicated solely on the Railway Labor Act. The statutory source of the bargaining representative's fiduciary duty not to engage in acts of hostile discrimination against members of the craft represented, thus supplying federal jurisdiction which would otherwise be non-existent, was clearly pointed out by this Court's decision in *Tunstall v. Brotherhood of Locomotive F. & E.*, 323 U.S. 210. Thus, if the injunction here had not been based on the Railway Labor Act, not only would the District Court have lacked jurisdiction to issue it under the Norris-LaGuardia Act, as we have pointed out, but there likewise would have been a complete absence of federal jurisdiction, there being no diversity of citizenship or other basis for jurisdiction of the subject matter. *Gully v. First National Bank*, 299 U.S. 109; *Starke v. New York, Chicago & St. Louis R. Co.*, 180 F. (2d) 569.

It is of course apparent that the court's decree could not itself be the source of the rights which it was designed to protect. Here the source was purely in the statute, and when that was amended petitioners were entitled to have the injunction modified accordingly.

III. The courts below erred in basing their refusal to permit negotiation of union security agreements authorized by Congress upon bitterness and hostility between union and non-union employees resulting from strike-breaking activities of the latter, and having no connection with the injunction sought to be modified.

In addition to the erroneous conclusions that the change in the Railway Labor Act was insufficient to justify modification of the injunction, and that the consent nature of the original decree dictated against such modification, the courts below relied upon evidence of hostility and bitterness arising out of a 1955 strike as supporting the de-

termination that there had been no change in the circumstances giving rise to the injunction which would support modification. The Court of Appeals even commented gratuitously upon the fact that certain of respondent carrier's employees were sent to prison in connection with the burning of a railroad bridge during the strike (R. 150), a circumstance not alluded to by the District Court.

The irrelevance of this situation to the motion to modify is readily apparent. The lengthy testimony taken showed that it had nothing to do with this case, or discrimination in job rights because of membership or nonmembership in any of the defendant labor organizations. It was instead the aftermath of an economic strike, and the hostility, bitterness and antipathy lay between those who went out on strike, and those who remained at work during the strike, irrespective of whether the latter were members or non-members of the organizations. In view of the safeguards provided in Section 2, Eleventh, of the Act, the fact that the labor organizations fined or expelled disloyal members for their refusal to support the strike constitutes no objection to a removal of the injunction's prohibition against negotiation of union security agreements pursuant to that section.

Section 2, Eleventh, is a most carefully drawn piece of legislation. A union-shop agreement conforming to its requirements, which is the only kind that petitioners could validly negotiate with the carrier, cannot require any employee as a condition of his railroad employment to do more than apply for union membership and tender the initiation fee and the periodic dues and assessments required of all other members.

If, after applying therefor, an employee should be denied membership in the appropriate union for any reason other than failure to tender the dues, initiation fee, or

assessments, or should he be suspended or expelled from membership for some reason other than that, he would be legally entitled to continue in his railroad employment as a non-member and to enjoy the same rights and benefits under the applicable collective bargaining agreement as union member employees in the same classifications.

Respondents' arguments below, and in opposition to certiorari here, as to the harm that would befall non-union employees as a result of the modification of the injunction<sup>4</sup>, are without foundation in fact or logic. No substantive rights of respondents would or could be affected by the proposed modification. As we have pointed out, rights find their source in the law, not in injunctions which are simply one form of remedy for their protection, and modification or vacation of a decree of injunction does not take anyone's rights away. And the statutory right to enter into union security agreements, hedged as it is with the safeguards prescribed by Section 2, Eleventh, does not and cannot operate to deprive anyone of his job unless he fails or refuses to comply with the union membership requirements which Congress has expressly sanctioned.

Respondents have argued that the requested modification of the injunction would result in a "grievous wrong" to them. The only "wrong" they might suffer would be the possibility of compulsory union membership under union security agreements that might be negotiated. Such

<sup>4</sup>Throughout this proceeding the carrier has been if anything more vehement than the other respondents in predicting the dire consequences that would ensue. For example, its brief in opposition to certiorari states that one of the purposes of the modification is to force non-union men out of their jobs (p. 13-14), and that "it would deprive the non-union men of the very things that were complained about; the right to overtime, the right to bid on new jobs, and the right of employment" (p. 26). In its zeal the carrier overlooks the fact that it was one of the original defendants against which the complaint sought relief, and one of the parties enjoined by the 1945 decree; and that none of the acts complained of or conduct enjoined could be consummated without its collaboration. Hires, firings, promotions, exercise of seniority rights, a signment of overtime work, etc., are necessarily administered by the employer, not the union. Indeed, the right of the carrier to be heard at all in opposition to the proposed modification is at best questionable in view of its defendant status.

contention on their part is tantamount to saying that Congressional enactment of Section 2, Eleventh of the Railway Labor Act was a grievous wrong. Such an argument should be addressed to the Congress of the United States, not to the courts.

On the other hand, perpetuation of the injunction would deprive petitioners of the opportunity to obtain substantial income from the present non-union employees of the carrier, and force the union members to continue to bear a commensurately greater burden in supporting the costs of collective bargaining. As this Court said in *Railway Employees' Dept., AFL v. Hanson*, 351 U.S. 225, 231, in tracing some of the legislative history of Section 2, Eleventh:

"... While non-union members got the benefits of the collective bargaining of the unions, they bore 'no share of the cost of obtaining such benefits.' *Id.*, at 4. As Senator Hill, who managed the bill on the floor of the Senate, said, 'The question in this instance is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions.' 96 Cong. Rec., Pt. 12, p. 16279."

Aside from the monetary aspects of the situation, we submit that it is patently inequitable to continue to enjoin petitioners from engaging in conduct which is perfectly lawful and in accordance with current Congressional policy, for the purpose of preserving for respondents a remedy for the protection of rights which have ceased to exist.

### CONCLUSION

For the foregoing reasons petitioners submit that the judgment below was in error and should be reversed, and pray that the case be remanded with directions for the entry of a judgment by the District Court granting the motion to modify the December 7, 1945, injunction so that it shall have no prospective application to prohibit the nego-



tiation, execution, or application and enforcement of any agreement or agreements authorized by Section 2, Eleventh, of the Railway Labor Act, as amended January 10, 1951, and that they may have their costs herein and such other relief as to the Court may seem proper.

Respectfully submitted,

**RICHARD R. LYMAN**  
741 National Bank Building  
Toledo 4, Ohio

**ROBERT E. HOGAN**  
Kentucky Home Life Building  
Louisville, Kentucky

*Attorneys for Petitioners:*

*Of Counsel:*

**SCHOENF & KRAMER**  
1625 K. Street, N.W.  
Washington 6, D. C.

**MULHOLLAND, ROBIE & HICKEY**  
741 National Bank Building  
Toledo 4, Ohio

System Federation No. 91,  
Railway Employees'  
Department, AFL-CIO  
International Association of  
Machinists  
Sheet Metal Workers'  
International Association  
Brotherhood Railway Carmen  
of America

**International Brotherhood of  
Electrical Workers**

**International Brotherhood of  
Firemen, Oilers, Helpers,  
Roundhouse and Railway  
Shop Laborers**

**International Brotherhood of  
Boilermakers, Iron Ship  
Builders, Blacksmiths,  
Forgers and Helpers**

**Railroad Lodge No. 205  
(Louisville, Ky.)**

**International Association of  
Machinists**

**Lodge No. 1073 (Corbin, Ky.)**

**International Association of  
Machinists**

**Subordinate Lodge No. 102  
(Louisville, Kentucky)**

**International Brotherhood of  
Boilermakers, Iron Ship  
Builders and Helpers of  
America**

**Pan American No. 576  
(Louisville, Ky.)**

**Brotherhood Railway Carmen  
of America**

**New Bridge Lodge No. 284  
(Ravenna, Ky.)**

**Brotherhood Railway Carmen  
of America**

**Local No. 445 (Ravenna, Ky.)  
Sheet Metal Workers'**

**International Association**

**Local No. 1004 (Louisville,  
Ky.)**

**International Brotherhood of  
Firemen, Oilers, Helpers,  
Roundhouse and Railway  
Shop Laborers;**

**Local No. 362 (Corbin, Ky.)  
International Brotherhood of  
Firemen, Oilers, Helpers,  
Roundhouse and Railway  
Shop Laborers; and**

**Local Union No. 1353  
(Louisville, Ky.)  
International Brotherhood of  
Electrical Workers Or Their  
Successors**

**PROOF OF SERVICE**

I, Richard R. Lyman, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of August, 1960, I served copies of the foregoing Brief for Petitioners on the several parties thereto as follows:

1. On Respondent Louisville and Nashville Railroad Company by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, as follows:

John P. Sandidge,  
Woodward, Hobson & Fulton  
1805 Kentucky Home Life Building  
Louisville, Kentucky.

H. G. Breetz,  
Louisville and Nashville Office Building  
Ninth & Broadway  
Louisville, Kentucky.

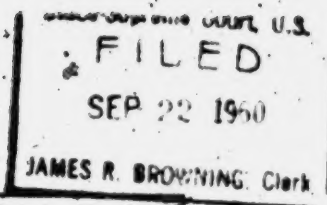
2. On Respondents other than Louisville and Nashville Railroad Company by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record, as follows:

Marshall P. Eldred,  
Brown & Eldred  
Board of Trade Building  
Louisville 2, Kentucky.

.....  
Richard R. Lyman



FILE COPY



IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1960

No. 48

(Formerly October Term, 1959, No. 756)

**SYSTEM FEDERATION No. 91 RAILWAY  
EMPLOYEES' DEPARTMENT, AFL-CIO,  
Et Al.,**

Petitioners,

*versus*

**O. V. WRIGHT, Et Al.,**

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

**BRIEF FOR RESPONDENTS OTHER THAN  
LOUISVILLE AND NASHVILLE  
RAILROAD COMPANY.**

**MARSHALL P. ELDRED,**

Board of Trade Building,  
Louisville 2, Kentucky.

*Attorney for Respondents Other  
Than Louisville and Nashville  
Railroad Company.*

*Of Counsel:*

**BROWN and ELDRED,**

Board of Trade Building,  
Louisville 2, Kentucky.



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**SYSTEM FEDERATION No. 91 RAILWAY  
EMPLOYEES' DEPARTMENT, AFL-CIO,  
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*v.*

**O. V. WRIGHT, Et Al.,** - - - - - *Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

---

**BRIEF FOR RESPONDENTS OTHER THAN  
LOUISVILLE AND NASHVILLE  
RAILROAD COMPANY.**

---

*To the Honorable, the Chief Justice, and the Associate  
Justices of the Supreme Court of the United States:*

The "Opinions Below", "Jurisdiction", and "Statute Involved", as set out on pages 1-4 of brief for petitioners are correctly stated therein. In addition, the case involves Section 2, Third, Fourth, Fifth and Eighth, of the Railway Labor Act, 45 U. S. C., Section 152, Third, Fourth, Fifth and Eighth. These additional provisions of the Railway Labor Act are printed in the appendix hereto.

**COUNTER-QUESTIONS PRESENTED.**

1. Did the District Court abuse its discretion in refusing to modify the injunction?

2. Did the District Court, in refusing to modify the injunction, depart from the rule enunciated in *United States v. Swift & Co.*, 286 U. S. 106, 76 L. Ed. 999?

3. Did petitioners meet the burden of proof of showing, as a result of the 1951 Amendment to the Railway Labor Act, a grievous wrong evoked by new and unforeseen conditions?

4. Did the 1951 Amendment to the Railway Labor Act alone entitle petitioners, as statutory bargaining representatives previously enjoined from requiring of non-union employees union membership as a condition precedent to employment benefits, to modification of the injunction so as to permit negotiation and adoption of union security agreements permitted, but not required, by such amendment?

5. Were petitioners precluded from obtaining a modification of the injunction by the agreed settlement, authorized by the Railway Labor Act, by all the parties, of all the issues in this case, including an agreement not to require union membership as a condition precedent to employment benefits, which agreed settlement became the decree of the court?

6. Where the original complaint alleged discrimination by petitioners against non-union employees because of refusal to join or to maintain membership



in the unions, did the District Court properly consider, as evidence of no change of factual situation, unrefuted evidence of continued and continuing bitterness and hostility between petitioners and non-union employees resulting from a strike upon the railroad's property?

7. In requesting a modification of an injunction which protects an agreement not to require union membership as a condition to employment benefits, did petitioners come into court with clean hands when undenied evidence showed bitterness and hostility between petitioners and non-union employees and threats of reprisal toward the latter by the former?

#### **COUNTER-STATEMENT OF THE CASE.**

Prior to December 7, 1945, non-union employees of the Louisville and Nashville Railroad Company employed throughout its system in the shop crafts comprising machinists, boilermakers, sheetmetal workers, carmen, electricians and stationary firemen and oilers and laborers, were the victims of discrimination in favor of union members with respect to such employment benefits as seniority, promotion, overtime and the like, because of their refusal to join, or maintain their membership in, the labor organization representing their respective craft.

Claiming that such discrimination violated rights guaranteed by the Railway Labor Act (45 U. S. C., Sec. 151, *et seq.*), twenty-eight of such employees, represent-

ing all non-union employees in the six shop crafts of said railroad, on July 16, 1945, filed against the affected shop craft unions and certain of their locals (petitioners herein) and against said railroad (respondent herein) a class action seeking a declaration of rights, an injunction against all future discrimination and monetary damages for past discrimination. (For caption of said complaint—filed in the United States District Court for the Western District of Kentucky, at Louisville—for specimen counts in said complaint, and for the prayer of the complaint, see R. 15-35.) The objectives of the suit, as shown by the allegations and prayer of the complaint, were:

1. A declaratory judgment *binding* on all parties *and their privies, settling* and declaring the *rights, interests and legal relations* of the parties . . . .

2. A declaratory judgment decreeing that the union defendants were under a duty to represent fairly, impartially and without discrimination all employees of the carrier without regard to whether they joined or retained membership in such unions . . . .

3. A declaratory judgment decreeing that such non-union employees were entitled to employment benefits irrespective of and without regard to whether they joined or retained membership in such unions . . . .

4. A declaratory judgment decreeing that the defendant railroad was also under a duty to treat fairly, impartially and without discrimination all employees, irrespective of whether they were members of any of defendant unions . . . .

5. A preliminary and permanent injunction against defendant unions and defendant railroad, *perpetually* restraining and enjoining them from requiring union membership as a condition precedent to employment benefits, *perpetually* restraining and enjoining them from denying employment benefits because of failure to join or retain membership in defendant unions, and *perpetually* restraining and enjoining them from failing to award employment benefits because of lack of union membership . . .

6. A judgment against all defendants, jointly and severally, awarding each plaintiff (twenty-eight of them) the sum of \$5,000.00.

Following the filing of the complaint below and the joining of issues, the defendants took depositions of various witnesses at several points on defendant railroad's property, after which *all* of the parties entered into a *complete settlement* of the causes of action alleged in the complaint. A release was prepared and signed by all of the plaintiffs (R. 138-144) wherein it was stated in part:

"Whereas it is the mutual desire of all of the parties to said action to *settle and dispose of all issues* in dispute among them in the following manner:" (R. 138). (Emphasis added.)

The manner in which the settlement was to be effected was specifically set out. The parties agreed to:

1. The "entering of a *consent decree* . . . the purpose of which will be to protect the undersigned against *any future acts or practices* of or

by the defendants which will deny to the undersigned any of their rights or benefits under the collective bargaining agreements now in effect or which may hereafter be entered into in accordance with the Railway Labor Act . . . a copy of which consent decree is attached hereto" (R. 38). (Emphasis added.)

2. The "waiver and release by the undersigned of any and all claims which they now have or may hereafter assert . . . for alleged wrongful acts done prior to the date of this release" (R. 139).

3. The "payment of the sum of \$5,000.00 by the defendants to the undersigned" (R. 139).

The release then recited that in consideration of \$5,000.00 paid by defendants to plaintiffs, "*and the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto*" (emphasis added) plaintiffs released defendants from all claims and damages for conduct of defendants occurring prior to the release, the date of which is December 1, 1945 (R. 139-144).

The original consent decree entitled "Judgment, Decree and Injunction" was entered in the District Court on December 7, 1945. It was, as revealed by its opening sentence: "By consent and agreement of all parties to this action, it is ordered, adjudged and decreed as follows:", a part of the agreed settlement of December 1, 1945 (R. 36). A copy of the consent decree was attached to the written settlement and became a part thereof.

On page 6 of their brief, petitioners said: "The claims of the twenty-eight named plaintiffs for monetary damages were separately settled and not covered by the decree."

Plaintiffs' claims for monetary damages were not settled separately from the decree. It is true that the decree does not mention the monetary settlement, but both the monetary settlement *and* the consent decree were part of the same written agreed settlement of December 1, 1945, entitled "Release." The twenty-eight named plaintiffs alleged \$140,000.00 in damages. If proof had disclosed more, amendments to conform would have been permitted. It is obvious that payment of \$5,000.00 to twenty-eight plaintiffs is a nominal settlement from a monetary standpoint. It is equally obvious that the real consideration for the agreed settlement and release was the consent decree. Plaintiffs were familiar with the terms of the consent decree, yet to be entered, when they signed the release.

The terms of the consent decree (and of the agreed settlement) provided that non-union employees of defendant railroad, employed in its shops, shall "be entitled, irrespective and without regard to whether said employees, or any of them, are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization, to" employments benefits in accordance with collective bargaining agreements, "*as provided for in such agreements now in effect or that may hereafter be in effect in accordance with the Railway Labor Act . . .*"

(R. 37). (Emphasis added.)



The injunction, which was an integral part of the decree, enjoined the defendant unions and the defendant railroad from requiring non-union employees to join or retain membership in defendant unions as a condition precedent to receiving certain employment benefits "and any other rights or benefits which may arise out of or be in accordance with the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that *may hereafter be in effect . . . in accordance with the Railway Labor Act . . .*" (R. 37-38). (Emphasis added.) The injunction also enjoined the defendant unions and the defendant railroad from denying to non-union employees employment benefits because of non-membership in the unions, and enjoined said defendants in the application of bargaining agreements from discrimination against non-union employees because of lack of union membership. The latter two prohibitions likewise specified bargaining agreements then in effect or which might thereafter be in effect in accordance with the Railway Labor Act (R. 38).

The non-union employees of defendant railroad have been diligent in protecting their rights under the agreed settlement, the decree and the injunction. An example is the affirmance by the United States Court of Appeals for the Sixth Circuit of a decree by the District Court finding defendant unions and defendant railroad guilty of violating the injunction and punishing them for contempt. *System Federation No. 91, et al. v. Reed*, 180 F. 2d 991 (1950).



In 1951 Congress amended the Railway Labor Act by adding Subsection Eleventh to Section 2 (64 Stat. 1238, 45 U. S. C. 152, Eleventh) permitting carriers and unions to negotiate and make union security agreements.

On page 6 of their brief, petitioners state that this Court, in *Railway Employees' Department, AFL v. Hanson*, 351 U. S. 225, 100 L. Ed. 1112, upheld the validity of the amendment and agreements negotiated pursuant thereto. Petitioners' stated interpretation of the Hanson decision is entirely too broad. As shown by the opinion in that case, it was a very narrow decision holding that Nebraska's "right to work" law did not prevail over the Railway Labor Act and that a union shop agreement, *under the facts disclosed by the record in that case*, did not violate any constitutional guarantees. The applicability of the Hanson decision, therefore, to the facts in this or any other case, is not to be presumed.

On July 2, 1957, petitioners filed their motion to modify the injunction of December 7, 1945, so as to permit petitioners to demand, adopt and enforce a union shop agreement on respondent railroad's property (R. 39-43).

Petitioners had served notice only on the railroad and on counsel for plaintiffs in the original action. The District Court required service of notice on all persons whose rights might be affected by the requested modification (R. 46-47).

Thereafter, objections to modification were filed by seven of the original plaintiffs and by eight intervening employees (R. 47-50, 56-59, 61-62). In addition, two hundred and one other employees were named in Exhibit A to the intervening petition as objecting to any modification of the decree and injunction (R. 62-68).

Both the original plaintiffs and interveners objecting to modification did so in behalf of all non-union employees of respondent railroad (R. 47, 59, 62).

Objections to modification were also filed by respondent railroad (R. 51-56).

On February 3, 1958, the motion for modification, and the various objections thereto, came on for hearing before the District Court. On behalf of respondents, evidence was offered and heard relating to continued and continuing hostility on the part of petitioners and their members toward non-union employees of respondent railroad who worked during a very bitter and violent strike which occurred on the property in 1955. This evidence, from both non-union and union employees, shows bitterness and antipathy existing between petitioners and respondent employees, and threats of reprisal and harassment by the former toward the latter (R. 81-137).

Following the hearing, all parties by counsel submitted briefs. On August 7, 1958, the District Court denied the motion for modification (R. 80). His memorandum opinion appears at R. 69-80.

An appeal was duly taken to the Court of Appeals for the Sixth Circuit, briefed and argued by all parties. On December 5, 1959, judgment was entered affirming the District Court (R. 149). The *per curiam* opinion appears at R. 150-152.

On petition for certiorari, this Court granted certiorari on April 18, 1960 (R. 153).

On page 4 of their brief petitioners refer to their motion "to modify a decree of injunction entered December 7, 1945." The effect of the requested modification would be not simply a modification of the injunction, but would be a modification of the heart of the entire decree which declares that compulsory unionism would not be required as a condition precedent to employment benefits.

Petitioners also state (pages 4 and 5 of their brief) that "the requested modification would remove from the scope of the injunction's prohibitions conduct which, while unlawful when the decree was entered, has subsequently been made lawful by Act of Congress." As we see it, the requested modification would place petitioners in a position to obtain that which was unlawful when the decree was entered, is now permitted but not required by the Act of Congress, but which petitioners freely, voluntarily and expressly, and for a valuable consideration, agreed to forego, then and in the future, and to which, under the record made in this case, they are not entitled.

### **SUMMARY OF ARGUMENT.**

A motion to vacate a judgment or modify an injunction under Rule 60 (b) is addressed to the sound legal discretion of the court and its determination will not be disturbed upon appeal except for an abuse of discretion. On the record made in this case, the District Court did not abuse its discretion in denying modification.

While a court of equity has inherent power to modify or revoke an injunction, even when based upon a consent decree, nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead a court to change what was decreed after litigation with the consent of all concerned. The District Court did not depart from this rule of law in denying modification.

The burden of proof was on petitioners to establish a legal reason or ground for their requested modification. They failed to meet this burden by showing any change in the factual situation or by showing any grievous wrong evoked by new or unforeseen conditions. Petitioners rely only upon the 1951 Amendment to the Railway Labor Act which permits, but does not require, a carrier and the bargaining representatives of its employees to adopt union security agreements.

Such an amendment to the Railway Labor Act alone was insufficient to warrant modification in this case because in a suit brought on behalf of non-union shop

craft employees for declaration of rights, for an injunction and for damages arising out of discrimination based upon non-union membership, all the parties to the litigation, including petitioners, entered into an agreed settlement of the case. The agreed settlement comprised a release of damage claims upon the payment of nominal damages in the sum of \$5,000.00 and in consideration of the entry of a consent decree declaring that non-union employees in the shop crafts were entitled to employment benefits irrespective of whether they joined or maintained membership in the unions representing their crafts, and the issuance of an injunction prohibiting the denial of employment benefits because of lack of union membership, and enjoining union membership as a condition precedent to employment benefits. The declaration of rights and the injunction were both expressly related in the decree to bargaining agreements then in effect between respondent railroad and petitioners or that might thereafter be in effect between them in accordance with the Railway Labor Act. The consent decree was framed by the parties, as their agreed settlement of the litigation, not only with respect to the present but with respect to the future, thus contemplating any amendment which might thereafter be made in and to the Railway Labor Act.

The 1951 Amendment to the Railway Labor Act is permissive only and not mandatory. The agreement of the parties to forego union security agreements with respect to the shop crafts on respondent railroad was lawful when made prior to the amendment, and is

lawful today, notwithstanding the amendment. There was sufficient consideration for such agreement and the same equities which permitted the agreement exist today, there having been no change in the factual situation surrounding the parties.

The District Court properly considered evidence of bitterness and hostility between petitioners and respondent employees as showing no change in factual conditions and as demonstrating that petitioners had not changed their attitude and feelings toward, or treatment of, non-union employees. Such evidence also demonstrated that petitioners, though seeking equity, came into court with unclean hands.

Respondent employees do not assert that the injunction issued in this case as part of the agreed settlement of the litigation and as part of the consent decree can never be modified. That question is not presented to this Court in this record. We submit that under the record made in this case petitioners did not meet the burden of proof that was upon them, the District Court did not abuse its discretion, but properly denied modification of the injunction, and that the judgment of the District Court should, therefore, be affirmed.



**ARGUMENT.****1. The District Court Did Not Abuse Its Discretion in Refusing to Modify the Injunction.**

In seeking a modification of the injunction granted by the consent decree entered in this case on December 7, 1945, petitioners filed their motion under Rule 60 (b) (5) of the Federal Rules of Civil Procedure (see pages 14-15, petitioners' brief). Such a request was addressed to the sound discretion of the District Court. Its determination cannot constitute a substitute for appellate review of the original decree nor will the lower court's denial of modification be disturbed upon appeal except for an abuse of discretion.

Numerous cases support the view that a motion to vacate a judgment under Rule 60 (b) is addressed to the sound legal discretion of the court and that its determination will not be disturbed upon appeal except for an abuse of discretion. *Securities and Exchange Commission v. Farm and Home Agency, Inc.*, 270 F. 2d 891 (7th Cir.); *Morse-Starrett Products Company v. Steccone*, 205 F. 2d 244 (9th Cir.); *Title v. United States*, 263 F. 2d 28 (Cert. Den. 359 U. S. 989), (9th Cir.).

Petitioners have not demonstrated any abuse of discretion by the District Court in refusing to modify the injunction in this case, as we shall point out in subsequent sections of this brief. Suffice it to say at this point that modification of an injunction is not a matter of right, but a matter of discretion, which cannot be

reviewed unless abused. In this case the District Court properly exercised its discretion in refusing to modify the injunction, which was part of a consent decree based upon an agreed settlement of all the issues in this case, where there was a complete absence of change in factual situation and where the change was merely in the Railway Labor Act permitting, but not requiring, union security agreements, and where modification would result in grievous wrong to respondent employees rather than to petitioners.

**2. The District Court Did Not Depart, in Refusing to Modify the Injunction, From the Law Enunciated by This Court.**

At the outset, we concede that the District Court had authority to modify the injunction heretofore issued in this case on December 7, 1945, notwithstanding the fact that the injunction was part of a decree which was entered by consent of all parties. In the case of *United States v. Swift & Co.*, 286 U. S. 106, 76 L. Ed. 999, this Court has clearly enunciated the rule that a court which issues an injunction has inherent right to modify or revoke it under certain circumstances. As this Court said in the opinion in that case:

“We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent.”

The injunction in this case contained a provision whereby the District Court retained control of the

action for the purpose of entering such further orders as might be deemed necessary or proper (R. 38), but, as said in the *Swift* opinion:

"If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."

"The result is all one whether the decree has been entered after litigation or by consent . . . . In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

However, power to modify cannot be lightly employed merely because one party to a consent decree is now unhappy with the prohibitions of that decree. This Court has pointed out unequivocally in the *Swift* case that modification may be employed only where there are changed conditions or changed circumstances which turn the injunction into an instrument of wrong. This Court has written the formula thus:

"Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The *Swift* case bears an interesting analogy to our case. In that case certain large packers were enjoined from dealing in, selling or transporting groceries. The defendants consented to the decree and the in-

junction. Ten years later, Swift and Armour sought a modification of the consent decree permitting them to sell groceries on the ground that the intervening years had brought about a change in the food industry, making it inappropriate, useless and oppressive to continue the injunction.

The lower Court granted the modification to permit the sale of groceries but this Court reversed with directions that the petition for modification be dismissed.

Speaking of the defendants in the *Swift* case, this Court said that mere size was not an offense against the Sherman Act but that:

“ . . . size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.”

The foregoing quotation may be aptly paraphrased in our case as follows:

“A union shop is not now contrary to the Railway Labor Act, but a union shop carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past, even with an open shop.”

In speaking of the injunction in the *Swift* case, this Court said:

“It did not say that the privilege to deal in groceries should be withdrawn for a limited time, or until the combination in respect of meats had been effectually broken up. It said that the privilege should be *renounced forever*, and this whether the units within the combination were acting collectively or singly. The combination was to be dis-

integrated, but relief was not to stop with that. To curb the aggressions of the huge units that would remain, there was to be a check upon their power, even though acting independently, to wage a war of extermination against dealers weaker than themselves. We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court." (Emphasis ours.)

Again, the foregoing quotation from the *Swift* case may very well be paraphrased in our own case as follows:

"The injunction here did not say that requiring membership in a union in order to get employment privileges should be enjoined only until the amendment of the Railway Labor Act permitting a union shop. It said that such requirements would be enjoined. We do not turn aside to inquire whether the injunction, if the case had been tried, could have been so limited. Instead, the defendants chose to consent and the injunction, right or wrong, became the judgment of the court."

### **3. Petitioners Did Not Meet the Burden of Proof of Showing a Grievous Wrong Evoked by New and Unforeseen Conditions.**

In seeking a modification of the injunction, the burden of proof was by law laid upon petitioners to establish a legal reason or ground for such modification.

In *Ford Motor Company v. United States*, 335 U. S. 303, 93 L. Ed. 24, this Court reversed a modification of an injunction, stating:

"The government has not sustained the burden of proof of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated."

In our case, where is the clear showing of grievous wrong written into the *Swift* formula? Not only have petitioners shown no grievous wrong, they have utterly failed to show any wrong. Petitioners deliberately agreed with respondents in this case and with the classes represented by respondent employees, namely, all non-union employees of respondent railroad, that union membership would not be a condition precedent to employment benefits. This agreement became the judgment of the court, to protect which the injunction was issued.

Petitioners need not have made such a far reaching agreement, for the law at that time prohibited the union shop, but make it they did. At that time there was no wrong, grievous or otherwise, in such an agreement. Today, there is no wrong, grievous or otherwise, in such an agreement, for it is just as legal today as it was when made. The amendment to the Railway Labor Act upon which petitioners rely merely permits the carrier and the unions representing its employees to adopt a union shop agreement but no compulsion is exerted by the amendment.



Petitioners argued (page 28 of their brief) that perpetuation of the injunction would deprive them of the opportunity to obtain substantial income from non-union employees of respondent railroad. It may be said with equal force that the modification of the injunction would result in loss of income to respondent employees and the classes represented by them, as they would then be compelled to pay initiation fees, dues and assessments in order to continue their employment.

Under the facts in this case, a loss of income to either the unions or the non-union employees is not an equity which can seriously affect the outcome of this case. When petitioners agreed to forego compulsory unionism as a condition of employment, they were then aware of the loss of income inherent in such an agreement. While compulsory unionism was not then permissible under the Railway Labor Act, nevertheless, as we shall point out later in this brief, petitioners had an eye to the future when a union shop would be permissible. Moreover, the consent decree and the injunction were written not only in the present tense but also in the future, as by express terms they were applicable to bargaining agreements then in existence and to bargaining agreements that might thereafter be in existence in accordance with the Railway Labor Act.

The original litigation from whence petitioners' motion to modify the injunction has arisen began because non-union employees of respondent railroad were being denied employment benefits by reason of their refusal to join or maintain membership in the unions.

The consent decree declared their rights to employment benefits without union membership. The amendment to the Railway Labor Act does not require the adoption or maintenance of union security agreements and for that reason there is nothing illegal today in the provisions of the original consent decree. The requested modification of the injunction would do far more than modify the injunction only. If such modification should be granted, petitioners would quickly compel the adoption by respondent railroad of union security agreements through the economic pressure of strikes. The result of this would be not merely a change in the injunction permitting petitioners to negotiate with respondent railroad for a union shop but would be complete emasculation of the consent decree itself so that what the non-union employees fought to obtain and did obtain would be taken from them completely. It thus follows that modification would result in grievous wrong to respondent employees and the classes represented by them and would thwart rather than effect the basic purpose of the consent decree and the injunction.

**4. The 1951 Amendment to the Railway Labor Act Alone Does Not Entitle Petitioners to Modification of the Injunction.**

Petitioners' entire case is based upon the 1951 Amendment to the Railway Labor Act; that amendment which provides that any carrier and the unions duly designated and authorized to represent its em-

ployees "shall be permitted" to make union security agreements. (Act of January 10, 1951, c. 1220, 64 Stat. 1238, 45 U. S. C., Sec. 152 Eleventh.)

The gist of petitioners' argument is that since they were not allowed to have union security agreements in 1945 when the consent decree was framed and the injunction issued in this case, and since the Railway Labor Act now permits negotiation for and adoption of union security agreements, that which the parties to this case agreed upon as a settlement of their differences and which became the decree of the court should now be rewritten to allow that which the law now permits but does not require. In other words, petitioners contend that this change of law alone, in the absence of a change of facts, is sufficient to warrant modification.

If the amendment in question required a carrier and the union bargaining representatives to execute and maintain a union shop upon the carrier's property, there might be some merit to petitioners' argument. The amendment, however, is merely permissive and the carrier and the unions are left free to ignore a union shop or even agree not to have one, if they so choose.

That the words "shall be permitted" in the amendment must be interpreted as being merely permissive appears to be an inescapable conclusion. In the first place, the amendment in question merely removed a prohibition against the adoption of union security agreements which had existed theretofore in the Railway Labor Act. By no means did it make mandatory

the adoption of union security agreements. The purpose of the prohibition, which was removed by the 1951 Amendment, was to break up the company unions which had flourished prior to the 1934 Amendment, which amendment gave to all employees the right to organize and bargain collectively through representatives of their own choice, free from any pressure by or interference from the carrier, thus guaranteeing an open shop. By 1951 Congress recognized that the danger of company unions was forever past. Congress then yielded to the pressure of the unions and granted permission, through the means of voluntary bargaining, to adopt union security agreements if desired by both the carrier and the unions.

In the second place, the "permissive" interpretation is borne out by the legislative intent as gathered from the arguments of the proponents of the 1951 Amendment who were instrumental in shepherding the amendment through Congress.

In the report of the Senate Committee which conducted hearings on the amendment, it was stated:

*"The bill would not require the execution of union shop agreements: It merely permits the carriers and the representatives of their employees, through the voluntary process of collective bargaining to include the union shop provisions in their collective bargaining agreements."* (Emphasis ours.)

(Vol. 2, *U. S. Congressional Service*, 1950, pp. 4319, 4320)

In speaking for the 1951 amendment on the Senate floor, Senator Hill stated:

"I should like to emphasize that the bill *would not require and does not in any way make mandatory the execution of union-shop agreements*; it merely permits the carriers and the representatives of their employees, through the *voluntary process* of collective bargaining, to include a union-shop provision in their collective bargaining agreements" (Cong. Rec., Vol. 96, p. 15882). (Emphasis ours.)

"The provisions of the bill are merely permissive. They do not require any railroad or labor organization to sign a contract. *It makes it permissive for management and labor to sit around the bargaining table* and, if they can work out an agreement, it is lawful for them to enter into it" (*Ibid.*, p. 16262). (Emphasis ours.)

Representative Sullivan stated:

"We are being asked to permit unions and management to make agreements regarding the union shop. *We are not being asked to vest in some Government board the authority to order union-shop agreements.* We are not being asked to set up some new authority at great expense to the Government *to administer some standards that will be set here.* We are simply proposing to say to railroad management and railroad labor—*If you fellows can get together on contracts of this sort and want to sign one it is all right.*" (*Ibid.*, p. 17057). (Emphasis ours.)

In the third place, courts generally have construed the word "shall" as meaning "may" when from the

general wording of the statute itself or from the obvious legislative intent, as gathered from the entire statute and the background, the meaning should be "may".

In *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630, 85 L. Ed. 1089, the language of Section 3 First (i) of the Railway Labor Act, providing that disputes which fail to reach adjustment in conferences with officials of the carrier "may be referred . . . to the appropriate division of the Adjustment Board" was before this Court for interpretation. This Court's opinion pointed out that a comparable section of the 1926 Railway Labor Act had used the word "shall" rather than "may". But this Court said that substituting "may" for "shall" was not an indication of a change in policy but was instead a clarification of the law's original purpose to provide for voluntary adjustment and mediation.

In the fourth place, this Court has set at rest any question of the interpretation of the words "shall be permitted" in the 1951 Amendment. Speaking of the 1951 Amendment in *Railway Employees' Department AFL v. Hanson*, 351 U. S. 225, 100 L. Ed. 1112, this Court said:

"The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements."

Since the parties to this litigation agreed that union security agreements would not be the price of employ-



ment benefits, we submit that the change in the Railway Labor Act, being permissive only, is not sufficient, in the absence of any change in the factual conditions surrounding the parties, to warrant modification of the injunction. The requirement of a showing of grievous wrong enunciated in the *Swift* case has been followed by many cases.

In the case of *Western Union Telegraph Company v. I. B. E. W., Local Union No. 134, et al.*, 133 F. 2d 955 (7th Circuit), an injunction was issued in 1924 enjoining appellees from interfering with appellant's business by means of a secondary boycott. Subsequently, after the passage of the Norris-LaGuardia Act (which legalized many of the acts prohibited under the decree) appellees applied for a modification of the injunction. The District Court entered an order modifying the decree to conform with the Act. The Circuit Court reversed. In the opinion, the court said:

"In the consideration of this question it is well to remember the admonition of the court in the *Swift* case, *supra*, 286 U. S. 119, 52 S. Ct. 460, 76 L. Ed. 999, that nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead the court to change what was decreed after years of litigation. In this connection we are permitted to examine and judicially notice the proceedings formerly had by the parties, *De Bearn v. Safe Deposit & Trust Co.*, 233 U. S. 24, 34 S. Ct. 584, 58 L. Ed. 833. From these records it appears that there was evidence tending to prove that appellees' agents resorted to destruction of appellant's property and made threats of violence

upon appellant's employees. It is possible that the appellees have mended their ways and have turned over a new leaf and that such a showing may be made, but it has not been made by the record in the instant case; consequently, we believe that justice would be better served if the cause were remanded to the District Court to inquire into the good faith of the appellees and whether they come into court with clean hands."

Before modification may be made, there must be a showing that such modification would serve to effectuate rather than thwart the basic purpose of the original decree. Illustrative of these cases is *Walling, etc. v. Harnischfeger*, 142 F. Supp. 202, where a motion to vacate and dissolve an injunction, issued under the Fair Labor Standards Act, was denied for the reason that the record did not show any substantial change in the situation except that the injunction had been complied with over a long period of time.

Speaking of modification, the court in *United States v. Radio Corporation of America, et al.*, 46 F. Supp. 654, said:

"It would seem, however, that such modification must be consistent with the purpose of the original decrees and calculated to effectuate and not thwart their basic purpose. *United States v. International Harvester Co.*, 274 U. S. 693, 702, 47 S. Ct. 748, 71 L. Ed. 1302; *Chrysler Corporation v. United States*, 316 U. S. 556, 62 S. Ct. 1146, 86 L. Ed. 471."

See also *Morse-Starrett Products Company v. Steccone*, 205 F. 2d 244 (9th Circuit), in which the appellee was enjoined from using a trade-name except in a certain manner. Twenty-two months after the entry of the original judgment a motion was made to modify the injunction under rule 60(b), Rules of Civil Procedure. The motion was denied by the District Court, which action was affirmed by the Court of Appeals. The opinion referred to the *Swift* case, pointing out that the court was to keep in mind that it was not framing a decree but was to inquire whether anything had happened to justify changing the decree. The court said:

"In the instant case there has been no adequate showing either that changed conditions make continuation of the injunction inequitable or that operation of the injunction cannot have the intended effect."

The appellee in the above case contended that rule 60(b)(6) was intended to broaden the power of federal courts to give relief from judgments, and that, therefore, the principle of the *Swift* case was no longer applicable. The court rejected this theory saying:

"The provisions of rule 60(b)(6) were not intended to benefit the unsuccessful litigant who long after the time during which an appeal from a final judgment could have been perfected first seeks to express his dissatisfaction. The procedure provided by rule 60(b) is not a substitute for an appeal."

A court is not permitted to act as a court of review under the guise of entertaining a motion to modify an original decree. Of course, no appeal was or could have been taken in our case in view of the consent nature of the decree. In our case there has been no change in the surrounding circumstances or the basic facts out of which the original decree arose. The uncontradicted evidence taken by the plaintiffs at the hearing below (R. 81-137) clearly indicates the rough treatment and abuse that are in store for the non-union employees of the railroad once a union shop is in effect upon appellee railroad's property. We believe it a reasonable inference drawn from the entire record in this case that if the injunction is modified, a union shop will be in effect upon appellee railroad within a short time, for while the non-union employees of the railroad undoubtedly will resist a union shop as long as they are able to oppose it, yet it cannot be expected that a carrier would resist for long the economic pressure of a strike.

Petitioners do not claim any change in the underlying facts or surrounding circumstances out of which the original decree arose. The only reason advanced by them for the modification is a change in the law, which as we have pointed out above is permissive in its nature and not mandatory.

Illustrative of the point that a change in law in the absence of a change of fact is insufficient for the modification of an injunction and that the court cannot act as a court of review under the guise of modifying an injunction is the case of *Degenhart v. Harford*, 59 Ohio

App. 552, 18 N. E. 2d 990. There the defendant was restrained from maintaining and operating a funeral home in a residential district upon two grounds; namely, that the maintenance of the home (1) was a nuisance and (2) was forbidden by a city ordinance. The court held that a subsequent change in the Zoning Ordinance permitting funeral homes within residential districts did not justify a modification of the injunction, on the ground that the original ordinance was "not the basis for the conclusion that the operation constituted a nuisance", the court adding:

"Were we to modify the injunction based upon this finding and decree, we would be in effect, acting as a court of review upon the decree of the Court of Appeals of Clark County, and in effect reversing the legal conclusion of that court upon a state of facts which has not been changed. This we are not permitted by law to do."

The question of whether a change in law would warrant a modification of an injunction was squarely presented to the court in the case of *Sunbeam Corporation v. Charles Appliances, Inc.*, 119 F. Supp. 492, where a motion by a dealer to vacate an injunction issued under the Fair Trade Law was denied, notwithstanding that the consent decree was issued prior to the decision of this Court holding that the Miller-Tydings Act did not apply to non-signers to price-fixing agreements. The court said:

"The mere change in decisional law upon which a permanent injunction was granted, in and of itself will not support the opening or modification

of the decree. The circumstances and situation of the parties must so have changed as to make it equitable to do so. This indispensable ingredient is lacking in the case at bar."

It was lacking in the *Sunbeam* case because the McGuire Act was enacted to overcome the effect of the Schwegmann decision. In our case, the indispensable ingredient is lacking because the circumstances and situation of the parties have not changed so as to make it equitable to modify the decree. The change in the decisional law permitting negotiation for union security has not, of itself, brought about a change in the circumstances which either assure complete protection to all employees or which will guarantee in the future that certain employees will not be mistreated within the unions after becoming members thereof.

Petitioners have cited no cases which, upon careful analysis, are found to hold that change of law alone is sufficient to warrant modification of an injunction. We will discuss the cases cited by them.

In *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U. S. 421, 18 How. 421, 15 L. Ed. 435 (page 17, brief), the basis for the subsequent dissolution of the injunction was not the change of any statutory law in existence at the time the injunction was granted. It was merely a declaration by Congress that the bridge in question did not interfere with navigation, a fact which was true at the time the injunction was issued as well as at the time the injunction was dissolved. There was no change in factual circumstances. The bridge had never been an



obstruction to navigation and the injunction should not have been issued in the first place.

In *Western Union Telegraph Co. v. International Brotherhood, Etc.*, 133 F. 2d 955 (page 17, brief), the plaintiff obtained an injunction enjoining defendants from interfering, through a secondary boycott, with plaintiff's business. The Court of Appeals affirmed because it was believed that the conduct by the defendant was prohibited by the Sherman Act. Subsequently, the Norris-LaGuardia Act was passed. The defendants then filed their petition for modification of the injunction and the modification was granted by the lower court.

The Court of Appeals reversed with directions to the trial court to hear evidence to determine whether the defendants had mended their ways. A reading of the opinion clearly demonstrates that the right to modification was not based upon the passage of the Norris-LaGuardia Act but on the decisions of this Court, handed down since the injunction was issued originally, holding that such activities as were enjoined were not in restraint of interstate commerce or violative of the Sherman Act. As the court said in its opinion:

" . . . we are impelled to the conclusion under the circumstances here appearing, that the appellant cannot invoke the Sherman Act as a basis for injunctive relief."

There again we find a situation where the acts complained of were not contrary to law, as the court

had originally believed. It was not a change in any statutory law.

In *Ladner v. Siegel*, 298 Pa. 487, 148 Atl. 699, 68 A. L. R. 1172 (page 17, brief), there was involved the use and operation of a storage garage in an exclusively residential area. The court granted an injunction prohibiting the use of the garage as a public garage. Subsequently, the injunction was violated and the owners were adjudged in contempt. The defendants then sought a modification of the injunction permitting the use of the garage building for the storage of automobiles by tenants of nearby apartment houses. The court granted the modification, which was affirmed by the Pennsylvania Supreme Court.

However, the Pennsylvania court did not approve the modification of the injunction upon the ground of statutory change alone. The court, in the opinion, set out the formula for a modification of the injunction. We quote herein:

"The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judically exercised, it believes the ends of justice would be served by a modification, *and* (b) where the law, common or statutory, has changed, been modified or extended, *and* (c) where there is a change in the controlling facts on which the injunction rested." (Emphasis added.)

It should be noticed that the conjunction "and" appears between (a) and (b) and between (b) and (c) in the quotation above appearing. Thus we see that

what the Pennsylvania court said is that modification of a decree *may be made* if the ends of justice would be served *and* where the law has been changed *and* where there is a change in the controlling facts on which the injunction rested. The single factor which more than anything else influenced the court in the *Ladner* case was a finding of a change in the controlling factual background, namely, that the residential district, in which so many apartment houses, hotels, schools and clubs were in use, was no longer so exclusively residential as to make the use of a storage garage a nuisance *per se*. Referring to the formula quoted above, the court said:

"It becomes apparent that the second and third reasons amply justify a modification of the decree, if there is nothing else to prevent it." \*

In *Santa Rita Oil Co. v. State Board of Equalization*, 112 Mont. 359, 116 P. 2d 1012, 136 A. L. R. 757 (page 18, brief), there was involved an injunction issued by the Montana Supreme Court in an original proceeding restraining the assumption, levy and collection of state taxes on oil and gas production under a lease of trust patent Indian land on the ground of interference with a federal instrumentality. Upon application by the defendant, the decree was modified.

Originally the court enjoined the assumption, levy and collection of the tax because the lessee was an instrumentality of the federal government and such taxes interfered with governmental functions. The original injunction was issued upon the basis of the

decision by this Court in certain cases holding that lessees of Indian trust patent land were instrumentalities of the federal government. Subsequently, this Court overruled these decisions (which the Montana court had followed) holding that the tax upon the instrumentality did not under the circumstances constitute an interference with governmental functions.

In the *Santa Rita* opinion, the Montana court said:

"It is a federal question whether these taxes constitute such an interference with the federal instrumentality as to be void and that question is now answered by the federal courts in the negative. Their decision on the point is binding upon this court."

The point is, the original injunction was issued because this Court had then said that the taxes in question would interfere with the governmental function. When this Court later confessed its error and held that such taxes did not interfere with governmental function, the Montana court properly modified its original injunction. In essence, this was a change of factual background or situation and not a mere change of law. Whether or not taxes interfered with governmental function, while decided as a matter of law, is nevertheless actually a matter of fact. When the interference no longer existed, equitable considerations would compel the modification of the injunction.

The case of *National Electric Service Corporation v. District 50, United Mine Workers of America* (Ky.), 279 S. W. 2d 808 (page 20, brief), involved

an injunction issued by the Harlan Circuit Court enjoining picketing for the purpose of coercing plaintiff's employees in joining the defendant union. The jurisdiction of the court was challenged upon the ground that the acts complained of constituted an unfair labor practice, of which the National Labor Relations Board had exclusive jurisdiction under the Labor Management Relations Act of 1957. The lower court overruled the objection and the Court of Appeals refused to dissolve the injunction.

Subsequently, this Court handed down a decision in *Garner v. Teamsters, Etc., Union*, 346 U. S. 485, 98 L. Ed. 228, which held that a state may not enjoin, under its own labor statute, conduct which had been made an unfair labor practice under the federal statutes. Following this decision, the defendant in the *National Electric Service Corporation* case moved the court to vacate the injunction, which motion was sustained by the lower court and affirmed by the Court of Appeals.

The crux of the case is that the Kentucky court had no jurisdiction to issue the injunction in the first place because the Labor Management Relations Act conferred exclusive jurisdiction on the National Labor Relations Board. There was no change in the Act subsequent to the issuing of the injunction. It remained the same. The basis for the vacation of the injunction was the pronouncement by this Court that the state court had no jurisdiction.

**5. Petitioners Are Precluded From Obtaining a Modification of the Injunction Because of the Agreed Settlement by All the Parties of All the Issues in This Case, a Settlement Authorized by the Railway Labor Act, Then and Now.**

Petitioners argue that an injunction is simply a remedy for the protection of a legal right but is not the source of the right. From this, they argue that when the legal right which formed the basis for the injunction is changed or terminated, the injunction should be accordingly modified or vacated. We agree with the premise that the injunction is a remedy and not the source of the right. We do not agree that *any* change in the legal right which formed the basis for the injunction warrants modification.

We concede that our complaint was predicated upon discrimination which was prohibited by the Railway Labor Act, and because of such prohibition, the District Court had jurisdiction to grant an injunction notwithstanding the *Norris-LaGuardia Act*. The Railway Labor Act made such discrimination unlawful and the court, therefore, had authority to enjoin the continuance or repetition of such discrimination.\* The injunction was not issued in this case because the Railway Labor Act did or did not permit the carrier and the bargaining representatives to adopt a union shop, but because the Act forbade discrimination.

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\**Steele v. Louisville and Nashville Railroad Company*, 323 U. S. 192, 89 L. Ed. 173.



As stated by the District Court in its opinion (R. 79-80):

"It is to be remembered that the provisions of the Railway Labor Act made illegal a union shop in 1945, when the injunction was agreed upon. Hence, it was then unnecessary for the railroad and the unions to agree, as they did, that the non-union members should not then be required to join or maintain membership in any of their craft unions as a condition precedent to employment. The law so prohibited, Section 152, Fourth and Fifth, Title 45, United States Code, Railway Labor Act. The railroad and unions went further to provide by their agreement that no such requirement of union membership should thereafter be in effect in any bargaining agreement in accordance with the provisions of the Railway Labor Act. The 1951 amendment to the Act did no more than make negotiations for a union shop permissive, *Railway Employees' Dept. v. Hanson, supra*. The amendment did not nullify the agreement or the injunction. It did not prohibit an agreement between the railroad and the unions that a union shop should not exist. Hence, the Court leaves the parties as they agreed to be and to remain."

We do not deny that our basic rights sprang from the Railway Labor Act but we continue to assert that the consent decree entered in this case, while it was lawful under the Railway Labor Act as it then existed and while it had its roots in the Railway Labor Act, nevertheless arose from the agreement entered into by the parties for the purpose of settling the litigation.

That agreement, lawful when it was made, did not become illegal by the amendment. As the District Court correctly pointed out, the amendment did not nullify the agreement or the injunction and the agreement remains lawful today.

To illustrate this point, suppose this case had not been filed prior to the amendment to the Railway Labor Act. Suppose discrimination by the bargaining representatives against non-union employees because of non-union membership (the open shop being in effect upon respondent railroad's property) existed today. Suppose further, the non-union employees filed suit for declaration of rights and an injunction. Under the terms of the Railway Labor Act, in the absence of a union shop, such plaintiffs would be entitled to the same relief to which the original plaintiffs in this case were entitled. Under such supposed state of facts, the parties could lawfully agree that union membership would not be required as a condition precedent to employment benefits. We need not speculate whether the parties would agree to such, but the right to do it exists today. Therefore, the amendment has not basically changed the picture nor entitled petitioners to modification. The agreement which the parties to this case did make and which became the basis for the consent decree is, therefore, important.

The twenty-eight plaintiffs named in the complaint alleged discrimination against them and the classes represented by them. Each of the twenty-eight plaintiffs alleged damages as a result of employment benefits already lost due to such discrimination. Each of the

twenty-eight plaintiffs sought to recover at least the sum of \$5,000.00 for such damages. Had a greater sum in damages been proven, doubtless amendments to conform to the proof would have been permitted.

The defendants in the original complaint had every opportunity to investigate the charges and to evaluate not only the character and quantity of the relief sought by the plaintiffs but also their chances of obtaining it. After utilizing the process of discovery depositions to aid them in this evaluation, a settlement was suggested and all the parties to this litigation agreed upon a settlement of all the issues therein. It cannot be denied that the parties settled the entire controversy, providing for the future protection of plaintiffs and the classes represented by them (non-union employees in the shop crafts), that union membership would not be required as a condition precedent to employment benefits and providing also a nominal settlement in the amount of \$5,000.00 for all of the damages claimed by all of the plaintiffs.

It must be remembered that this case was not submitted to the District Court for judgment and the District Court did not determine the rights of the parties or resolve the controversy existing among them independently of the agreement of the parties. Since the District Court did not determine the issues joined, the consent decree necessarily had to be based on something. It could not have materialized out of thin air or cosmic dust. What gave it birth was the agreement of the parties and this agreement was that no membership in the unions would be required for employment

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benefits. This agreement was permitted by and was effective under the Railway Labor Act as it then existed. It is permitted by and is effective under the Railway Labor Act as it now has been amended.

It should also be remembered that the unions agreed *with* the non-union employees and not *for* them that union membership would not be required as a condition to employment benefits. Thus it is apparent that such an agreement was not a collective bargaining agreement but was a settlement of the litigation then existing.

As a matter of fact the release signed by all the named plaintiffs at the time of the settlement (R. 138-144) is dated December 1, 1945. It refers to the settlement "of all issues in dispute" by the "entering of a consent decree in the aforesaid action, the purpose of which will be to protect the undersigned against any future acts or practices of or by the defendants which will deny to the undersigned any of their rights and benefits now in effect or which may hereafter be entered into in accordance with the Railway Labor Act by and between the L. & N. Railroad Company and System Federation No. 91, *a copy of which consent decree is attached hereto*" (R. 138, emphasis added).

The terms of the consent decree were known to the plaintiffs when the release of December 1, 1945, was executed by them. Furthermore, the consideration of the release was stated to be, in part, "the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto . . . ." (R. 139).

The consent decree was entered on December 7, 1945, but the parties to the litigation had theretofore agreed upon the terms and provisions of the consent decree. It was this agreement, permitted by the Railway Labor Act, which furnished the foundation for the consent decree, to protect which the injunction was issued.

The change in the Railway Labor Act, as we have heretofore argued, had no effect upon the agreement of the parties that union membership would not be a condition to employment benefits. Petitioners argue (page 12, brief) that the decree which was entered in 1945 was a judgment defining the "then existing rights and obligations of the parties under the Railway Labor Act . . ." Apparently petitioners are unable to see this consent decree in the proper perspective for it not only defined existing rights but future rights of the parties *under the Railway Labor Act*. An examination of the consent decree (R. 36-59) reveals that both its declaratory and injunctive phases are expressly tied to bargaining agreements then in effect "or that may hereafter" be in effect in accordance with the Railway Labor Act. It is quite clear that the parties contemplated that to whatever extent the Railway Labor Act might in the future be amended, nevertheless as far as the rights of the parties to this action were concerned, including the classes represented by them, union membership would not be required as a condition precedent to employment benefits:

Petitioners and their counsel were well aware at the time of the agreed settlement of this litigation and

of the framing of the consent decree that at any time Congress could, and probably would, amend the Railway Labor Act to permit union security agreements. They were well aware that the railroad brotherhoods could, and probably would, exert pressure on Congress to permit the execution of such agreements.

Even under the Railway Labor Act as it existed at the time of the consent decree, and some two years prior thereto; petitioners had demanded of respondent railroad and other carriers a union shop agreement for the crafts involved in this case. Before the consent decree was written, petitioners were trying to obtain a union shop agreement upon respondent railroad. The demand was serious enough to require its submission, under the provisions of Section 10 of the Railway Labor Act (45 U. S. C., Section 160), to the National Railway Labor Panel Emergency Board in the year 1943. The case, designated as Case No. A-1350, went through the processes under the Railway Labor Act of negotiation and mediation through the National Mediation Board. (Records of the National Mediation Board: Transcript of Proceedings of the National Railway Labor Panel Emergency Board—Union Shop and Wage Increase Case—Book I, page 9.)

Petitioners were represented in that case by Frank L. Mulholland, Clarence M. Mulholland and Willard H. McEwen, of the same firm now of counsel for petitioners in our case. In fact, Mr. McEwen who appeared for petitioners in the union shop dispute before the Emergency Board was one of counsel for peti-



tioners in this case who attended the taking of depositions of various witnesses prior to the agreement among the parties which resulted in the consent decree.

In their brief before the Emergency Board on the union shop proposal, counsel for the unions argued that a union shop was legal under the Railway Labor Act as it then existed. (Transcript of Proceedings of the National Railway Labor Panel Emergency Board, Book II, pages 1972-1981.)

Furthermore, counsel for the unions in that case stated:

"We find nothing in the Railway Labor Act which prevents such a board from recommending that the Act itself be amended if such a procedure appears to be the most feasible method of settling the dispute in question. We have called the Board's attention to the fact that the emergency war powers of the President are such that he might by executive order or otherwise establish a union shop in this industry" (*ibid*, page 1980).

The decision of the Emergency Board, reported to the President on May 24th and 29th, 1943, comprises "Report To The President By The Emergency Board" and appears in Book II, *supra*, pages 2085-2095, and "Supplemental Report To The President By The Emergency Board" appearing in Book II, *supra*, pages 2097-2167.

The Supplemental Report Of The Emergency Board, in reporting on the background of the dispute, set out the notices served on the carriers by the Co-

operating Railway Labor Organizations. In part, said notice read as follows:

"Please accept this as formal notice, served in accordance with the Railway Labor Act as amended of our desire to execute an agreement as hereinafter stated and to increase all rates of pay for all employees we represent as hereinafter stated, effective October 25, 1942.

"We propose that you agree: that all employees represented by this organization and who are eligible to membership in this organization shall become members in good standing of this organization within 60 days from the date this proposal is accepted and made effective and shall remain members in good standing of this organization as a condition precedent to continued employment; provided that these conditions shall apply to employees hired after date they are effective, but these employees will be allowed a period of 90 days from the date hired to secure such membership" (Book II, *supra*, page 2106).

In its decision the Emergency Board did not approve the union shop proposal (Book II, *supra*, page 2118). The Emergency Board, therefore, recommended that the union shop request be withdrawn by the Cooperating Labor Organizations (Book II, *supra*, page 2166).

This Court has the authority to take judicial notice of the decision of the Emergency Board to which we refer above. See *Bowles v. United States*, 319 U. S. 33, 87 L. Ed. 1194, in which this Court noted that it took judicial notice of a decision of the Director of Selec-

tive Service. The National Railway Labor Panel Emergency Board being authorized by Section 10 of the Railway Labor Act and having been established pursuant to executive orders of the President of the United States and of the Chairman of the Board (Book II, *supra*, pages 2167-2173), its decisions are likewise subject to judicial notice by the Courts of the United States.

Thus it appears that some two years before the entry of the consent decree in our case the unions involved therein made a determined effort to obtain a union shop agreement upon respondent railroad. It cannot be said, therefore, that when the consent decree was drafted, petitioners did not contemplate a continuing effort to obtain a union shop upon the respondent railroad's property. Nevertheless, the decree made no provisions for a change in the event a union shop agreement would become permissible. The agreement contained neither a limitation as to time nor as to future amendments to the Railway Labor Act which would permit a union shop agreement.

In settling all the issues in this case, the original plaintiffs gave up their rights to recover substantial damages and agreed to receive only nominal damages in consideration of a consent decree which gave to them and the classes represented by them the right to employment benefits without requiring union membership.

General considerations of equity will not suffer respondent employees to be put in a position which they occupied prior to the issuance of the injunction, but with none of the rights they then had to compel

petitioners to pay damages sustained at their hands. A modification of the injunction as desired by petitioners would deprive respondent employees of the right to rely upon a settlement effected when each side gave up something of value in order to agree on the consent decree. The respondent employees gave up their right to prove adequate damages. Petitioners gave up their right to continue requiring union membership as a condition precedent to employment benefits.

Petitioners argue (page 11, brief) that they stand "perpetually enjoined" from seeking the benefits of union security agreements and that a denial of the requested modification will maintain an everlasting prohibition against what Congress has said shall be permitted.

While we believe that the agreed settlement is just what it purports to be—an agreement by all the parties to this litigation that non-union shop craft employees on respondent railroad will never be required to join or maintain membership in the shop craft unions as a condition precedent to employment, yet we do not assert or contend that under no circumstances could the injunction in this case ever be modified. We have tried to be completely candid in our presentation of this matter to this Court. We have hereinabove conceded that courts of equity have inherent and continuing power to modify or revoke their injunctions, provided legal and compelling reasons exist. In view of that concession we cannot, and do not, categorically state that the injunction in this case could *never* be modified.

We submit that the question of whether the injunction issued in this case could *ever* be modified in the future is not the question to be decided by this Court at this time. The sole question before this Court now is whether the District Court abused its discretion in denying the modification in the light of the showing made by the record in this case. We submit that under the record in this case, now before this Court, there has been no abuse of discretion by the District Court, that there has been no showing by petitioners that they are entitled to modification of the injunction, that they have not met the burden of proof imposed upon them in this matter, and that the decisions of both the District Court and the Court of Appeals should, therefore, be affirmed.

**6. The District Court Properly Considered Evidence of Continued Bitterness and Hostility Between Petitioners and Non-Union Employees.**

Petitioners argue that the District Court erred in relying upon evidence of hostility and bitterness between petitioners and non-union employees arising out of the 1955 strike which occurred upon respondent railroad's property as showing that there had been no change in the circumstances giving rise to the injunction. They argue that evidence of such bitterness and hostility introduced by respondents (unrefuted by petitioners) was irrelevant (pages 25-28, brief).

While the District Court did consider undenied evidence of hostility and bitterness, he said: "The ex-

istence or non-existence of animosity, hostility or bitterness is not decisive of the question involved on the pending motion" (R. 79).

However, the District Court, referring to statements by counsel for petitioners that any threats or reprisal on the part of the unions toward employees who worked during the 1955 strike could be avoided by suitable provisions in the order of modification, stated that the Court could not undertake supervision of the conduct of the unions and their affairs among their own membership (R. 79). The unrefuted evidence of hostility and bitterness introduced at the hearing below on behalf of respondents is clearly relevant for the purpose of showing that there still exists the same attitude on the part of the unions toward non-union members—the attitude of animosity and bitterness which spawned the discrimination resulting in the original litigation. The evidence was relevant for the purpose of showing no change in background or factual situation and of showing that petitioners, feeling toward non-union employees as they have always done, have not changed to the point where modification of the injunction is warranted. Courts, from the proven experience of mankind, may make all reasonable and logical inferences from proven facts. If the requested modification of the injunction in this case be granted, a union shop will be forced upon respondent railroad, and respondent employees who are the objects of ill will upon the part of petitioners will be taken into membership and thereafter subjected to all manner of indignities and harassment, against which what would



remain of the decree and injunction would be powerless to protect.

A reading of the evidence heard at the trial (R. 81-137) not only shows the physical violence and indignities suffered by non-union employees who worked during the 1955 strike but brings to light the threats of reprisal made by petitioners to these employees. Illustrative of such reprisal is the testimony of Simon Durant. He was told that "as soon as this injunction is *mortified*, we will get all the scabs . . ." (R. 91).

W. S. Scholl, Director of Personnel of respondent railroad, testified that over the entire L. & N. system about 40% of the employees in the shop crafts worked during the 1955 strike. After the strike an agreement was executed by the carrier and the shop craft unions which contained this paragraph: "All employees will be restored to service without prejudice or reprisal and with all seniority and all other rights unimpaired including all rights under group or other insurance plans" (R. 128). Notwithstanding the agreement, the violence and indignities suffered by the employees who worked during the strike and the threats made against them, as disclosed by the evidence in this case, occurred *after* the strike had ended. Mr. Scholl testified that notwithstanding the no-reprisal agreement, he had received numerous complaints from many employees of abuses and indignities suffered because they had worked during the 1955 strike and it was necessary for the railroad to maintain special police. On the date of the hearing (February 3, 1958) it was still neces-

sary to maintain special police at two terminals on respondent railroad (R. 129-130).

The evidence in the record in this case further demonstrates the failure on the part of petitioners to meet the burden of proof required to warrant a modification of the injunction.

In *Western Union Tel. Co. v. International Brotherhood, Etc.*, 133 F. 2d 955, it appeared from the records in another case involving the same parties that appellees, through their agents, had resorted to destruction of appellant's property and made threats of violence upon appellant's employees. Said the Court:

"It is possible that the appellees have mended their ways and have turned over a new leaf and that such a showing may be made, but it has not been made by the record in the instant case; consequently, we believe that justice would be better served if the case were remanded to the District Court to inquire into the good faith of the appellees whether they come into court with clean hands."

The District Court cannot be required to police the treatment of former non-union members by the unions after a union shop is in effect. One would be naive indeed, in view of the bitterness now existing between union and non-union employees, to believe that once a union shop were in effect, there would be no mistreatment by the unions of non-union employees. With the burden on petitioners, it is not required of respondents to blueprint the manner in which mistreatment may be carried out. It is sufficient to show

bitterness, hostility and threats existing between petitioners and respondent employees. As long as such a climate prevails, the equities of the case demand that the parties be left as they are.

#### **7. Petitioners Do Not Come Into Court With Clean Hands.**

The evidence introduced on behalf of respondent employees at the hearing on the requested modification, discussed in the previous section of this brief, demonstrated quite clearly that petitioners did not come into court with clean hands. Petitioners came into equity seeking equitable relief in the form of a modification of a consent decree. One requirement under the *Swift* formula is that the requested modification must promote equity. But petitioners cannot seek or promote equity when they come into court with unclean hands. No principle of law is more firmly embedded in our jurisprudence than that which prescribes that he who seeks equity must do equity and he who comes into equity must come with clean hands. As the Kentucky Court of Appeals said in *Barrowman Coal Corporation, et al., v. Kentland Coal & Coke Co., et al.*, 302 Ky. 803, 196 S. W. 2d 428 (433):

"It is he who 'comes' and he who 'seeks' affirmative relief who is denied it when he is himself guilty of inequitable or unconscionable conduct in relation to the transaction."

*In Precision Instrument Manufacturing Company v. Automotive Maintenance Machinery Company*, 324

U. S. 806, 89 L. Ed. 1381, speaking of the doctrine of clean hands, this Court said (814):

"This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitable-ness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This pre-supposes a refusal on its part to be 'the abettor of iniquity.' *Bein v. Heath*, 6 How. (U. S.) 228, 247, 12 L. Ed. 416, 424. Thus while 'equity does not demand that its suitors shall have led blameless lives,' *Loughran v. Loughran*, 292 U. S. 216, 229, 78 L. Ed. 1219, 1226, 54 S. Ct. 684, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. *Keystone Driller Co. v. General Excavator Co.*, 290 U. S. 240, 245, 78 L. Ed. 293, 296, 54 S. Ct. 146; *Johnson v. Yellow Cab Transit Co.*, 321 U. S. 383, 387, 88 L. Ed. 814, 818, 64 S. Ct. 622; 2 *Pomeroy*, *Equity Jurisprudence*, 5th Ed. Secs. 397-399.

"Accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor."

"Clean hands" is a necessary element in obtaining a modification. See *Western Union Telegraph Company v. International Brotherhood, etc., supra*, where the court pointed out that the record did not show that appellees had mended their ways and where the Court of Appeals for the Seventh Circuit remanded the case to the District Court "to inquire into the good faith of the appellees and whether they come into court with clean hands."

### CONCLUSION.

For the foregoing reasons respondents other than Louisville and Nashville Railroad Company submit that the judgment below was proper and in accord with law and should be affirmed, that they have their costs herein expended and such other relief as this Court may deem proper.

Respectfully submitted,

**MARSHALL P. ELDRED,**

Board of Trade Building,  
Louisville 2, Kentucky,

*Attorney for Respondents Other  
Than Louisville and Nashville  
Railroad Company.*

*Of Counsel:*

**BROWN AND ELDRED,**

Board of Trade Building,  
Louisville 2, Kentucky.

**PROOF OF SERVICE.**

I, Marshall P. Eldred, attorney for respondents other than Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 21, day of September, 1960, I served copies of the foregoing Brief for Respondents Other Than Louisville and Nashville Railroad Company on the several parties hereto as follows:

1. On petitioners by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record as follows:

Richard R. Lyman  
741 National Bank Building,  
Toledo 4, Ohio

Robert E. Hogan  
Kentucky Home Life Building  
Louisville 2, Kentucky

Schoene & Kramer  
1625 K Street, N. W.  
Washington 6, D. C.

2. On respondent, Louisville and Nashville Railroad Company, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record as follows:

John P. Sandidge  
Woodward, Hobson & Fulton  
Kentucky Home Life Building  
Louisville 2, Kentucky

H. G. Breetz  
Louisville and Nashville Office Building,  
908 West Broadway  
Louisville 2, Kentucky

*Marshall P. Eldred*

**MARSHALL P. ELDRED**



APPENDIX

## APPENDIX

### RAILWAY LABOR ACT

Section 2, Third, Fourth, Fifth and Eighth  
(45 U. S. C., Section 152, Third, Fourth, Fifth and Eighth)

#### DESIGNATION OF REPRESENTATIVES

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

#### ORGANIZATION AND COLLECTIVE BARGAINING; FREEDOM FROM INTERFERENCE BY CARRIER; ASSISTANCE IN ORGANIZING OR MAINTAINING ORGANIZATION BY CARRIER FORBIDDEN; DEDUCTION OF DUES FROM WAGES FORBIDDEN

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any

way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions; *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation of its employees while engaged in the business of a labor organization.

**AGREEMENTS TO JOIN OR NOT TO JOIN LABOR  
ORGANIZATIONS FORBIDDEN**

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

**NOTICES OF MANNER OF SETTLEMENT OF DISPUTES; POSTING .**

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1960

No. 48

(No. 756—October Term, 1959)

**SYSTEM FEDERATION No. 91, RAILWAY  
EMPLOYES' DEPARTMENT, AFL-CIO,  
ET AL.,**

Petitioners,

*VERSUS*

**O. V. WRIGHT, ET AL.,**

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

**BRIEF FOR RESPONDENT, LOUISVILLE AND  
NASHVILLE RAILROAD COMPANY.**

**JOHN P. SANDIDGE,  
WOODWARD, HORSON &  
FULTON,**

1805 Kentucky Home Life Building,  
Louisville, Kentucky,

**H. G. BREETZ,  
W. L. GRUBBS,  
M. D. JONES,**

**JOSEPH L. LENIHAN,**

908 West Broadway,  
Louisville, Kentucky,

*Attorneys for Respondent, Louis-  
ville and Nashville Railroad  
Company.*

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IN THE  
**Supreme Court of the United States**

October Term, 1960

No. 48

(No. 756—October Term, 1959)

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**SYSTEM FEDERATION No. 91, RAILWAY  
EMPLOYEES' DEPARTMENT, AFL-CIO  
Et Al.,** - - - - -

*Petitioners,*

*v.*

**O. V. WRIGHT, Et Al.,** - - - - -

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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**BRIEF FOR RESPONDENT, LOUISVILLE AND  
NASHVILLE RAILROAD COMPANY.**

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**I. OPINIONS BELOW.**

The Opinions below of the United States District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit are correctly reported in Petitioners' brief.

The unreported "Judgment, Decree and Injunction—Entered December 7, 1945", modification of which is sought herein, appears at page 36 of the record herein.

## II. JURISDICTION OF THE COURT.

Jurisdiction of this Court is correctly stated in the Petitioners' brief.

## III. STATUTES INVOLVED.

45 U. S. C., Sec. 152, Third, Fourth, Fifth, Eighth, Ninth and Eleventh (44 Stat. 577, 48 Stat. 1186, 62 Stat. 909, 64 Stat. 1238), being parts of Section 2 of the Railway Labor Act. Subsection Eleventh is quoted verbatim in Petitioners' brief (pp. 2-4). Subsections Third, Fourth, Fifth, Eighth, and Ninth are set forth in the Appendix hereof.

## IV. COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

A. Were the District Court and the Court of Appeals for the Sixth Circuit correct in following the rule concerning the showing required of the moving party as set forth by this Court in *United States v. Swift & Company*, 286 U. S. 106?

B. Did the District Court abuse its discretion in refusing to modify the injunction when the Unions, the moving party, failed to make, as required by *United States v. Swift & Company*, 286 U. S. 106, a clear showing of extreme hardship such as to justify a finding that the Unions were victims of oppression or grievous wrong?



C. Since there was no change in the factual situation justifying a modification of the injunction, does the mere change of the law made by the 1951 Amendment to the Railway Labor Act (45 U. S. C., Sec. 152, Eleventh) compel the modification sought, particularly where, as here, the injunction was based upon an agreement of the parties that the prohibition of the union shop was to have prospective application?

D. Was the motion to modify the injunction, on the sole ground of change of law, properly denied where the uncontradicted proof establishes that the moving party has unclean hands?

## V. COUNTER-STATEMENT OF THE FACTS.

In order to give the Court the proper background in this case, it will be necessary to state the facts concerning this litigation from its inception in 1945.

On July 16, 1945, the plaintiffs, employees located at various points on the Louisville and Nashville Railroad, brought an action against System Federation No. 91, Railway Employees' Department, American Federation of Labor, a group of affiliated international and local labor organizations, various officers of the local labor organizations and the Louisville and Nashville Railroad Company (R. 15-18).

The complaint alleged (R. 18-32) that the defendants had consistently violated the purpose, terms and provisions of the Railway Labor Act by hostile discrimination against the members of the different crafts

who were not members of the Unions and their locals, for the purpose of giving preference to members of the different crafts who were members of the Unions. It was alleged that said defendants followed towards the members of the crafts who were not members of the Unions a policy calculated to limit the freedom of association among said employees and to force them into joining the Union, putting into effect a virtual "closed shop." It was alleged, further (R. 22-27), that the Unions and the Railroad had violated the Railway Labor Act in denying to the employees who did not belong to the Unions, among other things, (1) the right to bid on vacancies, (2) the right to promotion to higher jobs or preferred jobs, and (3) the right to work overtime at punitive rates of pay.

There were twenty-eight original plaintiffs (R. 15). They sought to recover damages in the sum of \$5,000 each, and, for themselves and the classes they represented, they alleged (R. 24-32) that they would continue to suffer irreparable injury unless the Court granted the relief requested. Summarily stated, the plaintiffs prayed for:

(1) A declaratory judgment, binding on all of the parties, settling and declaring the rights, interests and legal relations of the respective parties (R. 32-34);

(2) An injunction to protect and enforce such rights and obligations as might be declared (R. 34-35); and

(3) Judgment awarding each of the plaintiffs the sum of \$5,000 (R. 35).

After the complaint was filed and some discovery depositions were taken by the Unions and the Railroad, a complete settlement of the case was agreed upon between the plaintiffs, the Union defendants and the Railroad defendant. Under date of December 1, 1945, the Union defendants, and the officers thereof, and the Railroad defendant took a comprehensive release from the plaintiffs (R. 138-144). The release recited that "it is the mutual desire of all of the parties to said action to settle and dispose of all issues in dispute among them in the following manner" (R. 138). It then listed three things which were to be done, and the first was "The entering of a consent decree in the aforesaid action . . . , a copy of which consent decree is attached hereto" (R. 138). Following such recitals, the release provided that "in consideration of the sum of \$5,000.00 this day paid to the undersigned by the defendants . . . and the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto", the plaintiffs executed the said release (R. 139).

Pursuant to the terms of the release, on December 7, 1945, the consent decree styled "Judgment, Decree and Injunction" was entered by the District Court (R. 36-39). The first sentence of this "Judgment, Decree and Injunction", hereinafter to be referred to as "consent decree", discloses that it was "by consent and agreement of all parties to this action." It ordered, adjudged and decreed as follows:

(1) That the Unions are under the obligation and duty to represent and treat fairly and impartially, and without discrimination based on membership or non-membership in any labor organization, all members of the crafts or classes, including plaintiffs, without regard to whether said employees are members or retain their membership in the Unions (R. 36);

(2) That the Railroad is under the obligation and duty to refrain from discrimination against its employees in the crafts or classes, including the plaintiffs, because of the failure or refusal of said employees to join or retain their membership in any of the Unions (R. 36-37);

(3) That the plaintiffs and all other employees of the Railroad in the crafts or classes involved who are not members of the Unions shall, in accordance with the collective bargaining agreements, be entitled, irrespective of and without regard to whether they join or retain membership in the Unions, to the rights of promotion, the proper protection of seniority, the right to bid on and be assigned to vacancies, the right to leaves of absence with proper protection of seniority, and the right to a proper share of overtime work, as provided for in such agreements then in effect or that may thereafter be in effect in accordance with the Railway Labor Act (R. 37);

(4) That all of the defendants be enjoined from requiring the plaintiffs, and the classes represented by them, to join or retain their membership in the Unions as a condition to receiving promotion, leaves of absence, proper protection of seniority, overtime work and other rights or bene-

fits which may arise out of or be in accordance with regularly adopted bargaining agreements then in effect or that might thereafter be in effect (R. 37-38); and

(5) That the defendants be further enjoined, in the application of the provisions of the regularly adopted bargaining agreements then in effect or that might thereafter be in effect, from discriminating against the plaintiffs and the classes represented by them by reason of, or on account of, the refusal of said employees to join or retain their membership in any of the Unions (R. 38).

The judgment, decree and injunction have remained in full force and effect, and twice the Railroad and the Unions have been called upon to defend contempt citations. *System Federation No. 91 v. Reed, et al.*, 180 F.2d 991 (C. A. 6th); *John R. Cain v. System Federation No. 91, et al.*, February 27, 1946, Western District of Kentucky, Civil Action 942 (Not Reported).

A motion to modify the injunction (R. 39-43) was filed July 2, 1957, by System Federation No. 91, Railway Employees' Department, A.F.L.-C.I.O. (formerly known as System Federation No. 91, Railway Employees' Department, American Federation of Labor), and other Union defendants or their successors.

The Unions moving to modify stated (R. 42) that they and other labor organizations representing different crafts of the Railroad's employees were currently seeking to negotiate, with respect to the employees of the Railroad represented by them under the Railway Labor Act, agreements requiring the employees so rep-

resented, as a condition of their continued employment, to become and remain members of the organizations representing their respective crafts, subject to the limitations and conditions prescribed in Section 2, Eleventh, of said Act as amended (R. 42).

The Unions further alleged (R. 40) that at the time of the institution of this action, and at the time of the entry of the decree of injunction, Section 2, Fourth and Fifth, of the Railway Labor Act (45 U. S. C., Sec. 152; Fourth and Fifth) made it unlawful for carriers to interfere in any way with the organization of their employees or to coerce or compel their employees to join or remain, or not to join or remain, members of any labor organization; that such prohibitions were generally construed as creating the "open shop" in the railroad industry, and as making unlawful the closed shop or union shop, as well as other forms of compulsory union membership agreements (R. 40).

In paragraph 5 of the motion (R. 43) it was alleged that the 1951 Amendment (45 U. S. C., Sec. 152, Eleventh) to the Railway Labor Act terminated, to the extent specified therein, the employees' right to be free from the requirements of union shop agreements and that it is no longer equitable that said decree of injunction should have prospective application to prohibit the defendants from negotiating such agreements pursuant to express Congressional authorization.

The Unions' motion to modify the injunction was based solely on this change of law. They introduced no evidence on the question whether or not there had



been a change in the *factual* situation which had existed at the time of the entry of the consent decree and injunction.

The employee Respondents introduced evidence showing that even at the time of the proceeding to modify, abuse and threats of discrimination continued to be directed against employees not in complete accord with union activities and policies (R. 81-137). The abuse and threats were intensified following a strike in 1955. After this strike it was necessary for the Railroad Company to provide police protection for such employees, and even at the time of the proceeding to modify the injunction, such police protection was still necessary at some points (R. 129). The record in this case shows that if the Unions are released from the restraint of this injunction, they or their members will make every effort to deprive the non-union men of their jobs (R. 91-92). The oral evidence shows that personal hatred and violence have been practiced, and are being practiced, against non-union workers. This injunction has preserved their jobs (R. 81-137).

In this proceeding to modify the injunction, the District Court concluded (R. 77) from the history of the 1951 Amendment of the Railway Labor Act, as reflected by the proceedings in Committees of Congress and as determined by this Court in the case of *Railway Employees' Department, et al. v. Hanson*, 351 U. S. 225, that the union shop provisions of the Railway Labor Act are *permissive*, and that Congress has not compelled or required carriers and employees to enter into

union shop agreements. The District Court therefore concluded (R. 77-78) that the 1951 Amendment to the Act leaves the Railroad and the bargaining Unions at liberty to agree that a union shop shall not prevail. This reasoning, applied to the agreement which underlay the injunction and declaration of rights of December 7, 1945, when the Railway Labor Act forbade a union shop, forced the Court to the conclusion that the unions had not been compelled to agree (as they did freely agree at the time of the consent decree) that membership in a Union would not be required of the plaintiffs as a condition of employment in any collective bargaining agreement then in effect between the Railroad and the Unions, or in such agreements as might thereafter be in effect between the Railroad and the Unions in accordance with the Railway Labor Act.

The District Court noted (R. 78) that a reading of the agreed judgment shows that it refers not only to any collective bargaining agreement then in effect but to such future agreements as might thereafter be made between the Railroad and the bargaining Unions; that in 1945 there was no provision in the Railway Labor Act prohibiting the Railroad and the Unions from agreeing that a union shop should not obtain; and that there is no prohibition now in the Railway Labor Act prohibiting the Railroad and the bargaining Unions from agreeing that a union shop shall not prevail. Therefore, under the *Hanson* case, *supra*, the Court reasoned, if the union shop agreement is permissive, it is also permissive to agree that a union shop shall not prevail.

The District Court (R. 78-79) concluded that it has continuing authority to modify the injunction, under the doctrine of *United States v. Swift & Company*, 286 U. S. 106, but that the change in the Railway Labor Act in 1951 deleting the prohibition against a union shop and making it permissive does not *compel* a modification of the decree which enjoined the Railroad and the Unions from providing for a union shop in existing agreements or those to be thereafter made. The Court concluded that the standard set up in the *Swift* case for modification of an injunction had not been met, ~~in that~~ there was no clear showing of grievous wrong evoked by new and unforeseen conditions which should lead the Court to change what had been decreed, after extended litigation, with the consent of all concerned.

The District Court did not consider the existence or non-existence of animosity, hostility, or bitterness as decisive of the question (R. 79), but expressed an unwillingness, *in view of the circumstances proven*, to supervise the affairs of the Unions to prevent the Unions from discriminating against the present non-union employees if they were taken into the Unions (R. 79).

The District Court stated that the provisions of the Railway Labor Act (45 U. S. C., Sec. 152, Fourth and Fifth) made illegal a union shop in 1945 when the injunction was agreed upon. Hence, it was then unnecessary for the Railroad and the Unions to agree, as they did, that the non-union members should not be required to join or retain membership in any union

(R. 79). *The Court pointed out that the Railroad and Unions went further and agreed (not only between themselves but also with the non-union employees of the Railroad) that no such union membership should thereafter be required in any bargaining agreement* (R. 80).

The District Court held that the 1951 Amendment did no more than make negotiations for a union shop permissive, as was recognized in the *Hanson* case, *supra*. It stated that the Amendment did not nullify the agreement or the injunction in question, and that it did not prohibit an agreement between the Railroad and the Unions that a union shop should not exist. The Court concluded to leave the parties as they agreed to be and to remain, and, accordingly, it overruled the motion to modify (R. 80).

Upon appeal to the United States Court of Appeals for the Sixth Circuit (R. 150-152), that Court dealt realistically with the case, which had been before it on a previous occasion. It noted that this controversy had its beginning in bitter disagreements between groups of union and non-union employees arising many years ago and that "it also stems from a strike, accompanied by much violence, in 1955, in which a railroad bridge was burned, and certain employees were sentenced to prison terms, for violation of, and conspiracy to violate the Federal Train Wreck Act," 18 U. S. C., Sec. 1992. It cited *Stanley v. United States*, 245 F. 2d 427 (C. A. 6th), the case involving those convictions. After reciting the facts of the case at bar, the Court

of Appeals affirmed the ruling of the District Court that when the injunction was issued the parties therein, by their consent thereto, provided that no requirement of union membership should thereafter be in effect in any bargaining agreement. It agreed that the 1951 Amendment did no more than make negotiations for a union shop permissive, and did not nullify the agreement or the injunction issued. It found no error in the order of the District Court, which, *under the circumstances of the case*, left the parties as they agreed to be. The Court of Appeals affirmed for the reasons set forth in the District Court's Opinion (R. 152).

On April 18, 1960, this Court entered an Order granting certiorari (R. 153).

## VI. SUMMARY OF ARGUMENT.

A motion to modify the decree made pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure is a motion addressed to the sound discretion of the District Court.

The decree for which the modification is sought was entered by the District Court on December 7, 1945, as a result of an agreed settlement of all issues in the case by all parties to the litigation. Under the terms of the settlement, the plaintiffs released all claims for damages,<sup>1</sup> based upon alleged acts of hostile discrimination against them by reason of their non-union membership,

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<sup>1</sup>The plaintiffs, in their complaint, had alleged damages to them in the total sum of \$140,000.00.



in consideration of (1) an agreement, which was to and did become the judgment and decree of the Court, providing, for the *future* protection of the plaintiffs and the classes represented by them (non-union employees in the shop crafts), that union membership would not be required as a condition precedent to employment benefits under agreements *then in effect* or that *thereafter* might become effective; and (2) the payment to them of \$5,000.00.

While the District Court retains power to modify the prospective effect of such a consent decree, this Court, in *United States v. Swift & Company*, 286 U. S. 106, held that nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead a court to change what was decreed with the consent of all concerned. The existence of such an agreement in the settlement of the aforementioned litigation, while not depriving the Court of its power to modify the decree, is nevertheless a fact to be considered in weighing the equities of the parties and in determining the proper exercise of the Court's power to modify the decree.

The Petitioners introduced no evidence. The non-union employees, for whose protection the decree was entered, made an affirmative and uncontradicted showing by testimony that there was no change in the attitude of hostility toward them by Petitioners' members; that efforts are still being made by union members to intimidate them and force them from their jobs and to cause them to be by-passed when promotions are



made and work is assigned; that such feelings of hostility against them were intensified following a strike in 1955; and that discrimination against them remains a real and present threat to their livelihood.

The Petitioners' entire case is that the 1951 Amendment to the Railway Labor Act *compels* the modification they demand, irrespective of the continued threats of discrimination and hostility, and that the District Court had no discretion to deny their motion.

The 1951 Amendment is permissive only, and not mandatory. *Railway Employees' Department, A.F.L. v. Hanson*, 351 U. S. 225. The Railway Labor Act, as amended in 1951, leaves the Railroads and the Unions free to agree that a union shop shall *not* prevail and that union membership shall *not* be a condition of continued employment. The agreement of the parties was lawful when made in 1945 and remains lawful today, notwithstanding the 1951 Amendment. This change of law alone does not compel the modification sought.

The only "grievous" wrong claimed by petitioners is the failure of the Unions to derive income from non-union members. This income could be obtained by them only by the establishment of a union shop, in which event what would remain of the injunction, after the modification, would be a decree purporting to protect the rights of a non-existent class. The modification sought thus would thwart the basic purpose of the original decree and confirm the Unions and their members in the discrimination which the decree was designed to dispel. Petitioners' suggestion that the

decree could be so modified as to incorporate protection for all activities other than the negotiation of a union-shop contract is in reality a suggestion that a new decree be entered; for the negotiation of a union-shop agreement would destroy the class the present decree was designed to protect. Such a new decree, to be effective, would require judicial supervision of the Unions' affairs, a task which the District Court properly declined to undertake in the circumstances proven.

The change of law effected by the 1951 Amendment was not unforeseen by the Petitioners. At the time of the agreed settlement in this case, in 1945, the railroad Unions, including the Unions involved in this case, already had begun urging the change in the Railway Labor Act which became effective in 1951 permitting the negotiation of union-shop agreements.

The record here discloses that the Petitioners are seeking equitable relief with unclean hands, inasmuch as threats of hostile discrimination against the employees protected by the decree are continuing to be made.

The Petitioners failed to sustain the burden of proof imposed by the *Swift* case. Under the record made in this proceeding, the District Court did not abuse its discretion in denying the motion for modification of the consent decree.

## VII. ARGUMENT.

A. The District Court and the Court of Appeals for the Sixth Circuit Were Correct in Following the Rule Concerning the Showing Required of the Moving Party as Set Forth by This Court in *United States v. Swift & Company*, 286 U. S. 106.

The Petitioners' motion to modify the injunction in this case was made under Rule 60(b)(5) of the Federal Rules of Civil Procedure. Rule 60(b) merely prescribes the procedure for obtaining relief. It does not purport to extend the substantive law as to the grounds for vacating judgments or decrees by going beyond the principles which have obtained in courts of equity for granting relief from judgments or decrees. The notes of the Advisory Committee on Amendment to Rules reported at 28 U. S. C. A., p. 313, reveals that the Advisory Committee stated:

"It should be noted that rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief."

Numerous cases have held that motions under Rule 60(b) are still addressed to the sound discretion of the trial court. *Perrin v. Aluminum Company of America*, 197 F. 2d 254, 255 (C. A. 9th); *Morse-Starrett Products Company v. Steccone*, 205 F. 2d 244, 248-249 (C. A. 9th); *Title v. United States*, 263 F. 2d 28 (C. A. 9th), cert. den. 359 U. S. 989, rehearing den. 360 U. S. 914, and cases cited therein.

In the case here before the Court, the District Court found as a fact that an agreement of the parties underlay the decree of December 7, 1945 (R. 78); that the agreement not only provided that the non-union members should not be required to join or maintain membership in any of their craft unions as a condition precedent to employment, but the agreement went further to provide that no such requirement of union membership should *thereafter* be in effect in *any* bargaining agreement between the Railroad and the Unions (R. 79-80).

The District Court, although recognizing the existence of the above-mentioned settlement agreement, held that it had the authority to modify the prospective application of the injunction under *United States v. Swift & Company*, 286 U. S. 106, and clearly recognized that the motion to modify the injunction was directed to the Court's discretion (R. 78). Further, there is no question but that the District Court followed the rule announced by the *Swift* case concerning the showing required to be made by the Petitioners to entitle them to the modification (R. 79).

This Court has pointed out clearly, in the *Swift* case, that discretion should be exercised to grant modification of a consent decree *only* where changed circumstances have caused the decree to become an instrument of grievous wrong. In the *Swift* case, this Court stated (at page 119):

“Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions

should lead us to change what was decreed after years of litigation with the consent of all concerned."

The Petitioners also cite and rely upon the *Swift* case (Brief, pp. 15-16). Thus, there is no dispute that the principles of the *Swift* case are applicable here. But the Petitioners, although they concede that the case is applicable here, at least imply that the District Court did not follow the principles announced therein by this Court. In Petitioners' brief (pp. 9-10), it is stated:

"... if the reasoning of the Courts below were to prevail, all consent decrees of injunction would be immune from modification, on the theory of an implied contract compelling the courts to leave the parties 'as they agreed to be and to remain'."

The District Court engaged in no such reasoning. On the contrary, it explicitly stated (R. 78):

"The Court agrees with counsel for the unions that there is continuing authority in the Court to modify the prospective application of a judgment of injunction. This is the teaching of the case of *United States v. Swift & Company*, 286 U. S. 106, where the Supreme Court said there was no doubt that a court of equity has power to modify an injunction in adaptation to changed conditions though the injunction was entered by consent."

The District Court thus clearly recognized its power to modify the consent decree; but it stated further (R. 78):

"There remains the question: should that power be exercised in this case?"

It is entirely clear that the District Court and the Court of Appeals correctly followed the decision of this Court in the *Swift* case. We shall also show in the subsequent sections of this brief that the District Court exercised sound discretion in overruling the Petitioners' motion.

**B. The District Court Did Not Abuse Its Discretion in Refusing to Modify the Injunction When the Unions, the Moving Party, Failed to Make, as Required by *United States v. Swift & Company*, 286 U. S. 106, a Clear Showing of Extreme Hardship Such as to Justify a Finding That the Unions Were Victims of Oppression or Grievous Wrong.**

There can be no question but that the party seeking the modification of an injunction, here the Petitioners, must carry the burden of establishing proper grounds for such modification. This principle is not only clearly established by *United States v. Swift & Company, supra*, but stands affirmed by this Court in the later case of *Ford Motor Company v. United States*, 335 U. S. 303. In the later case this Court reversed a judgment granting a modification of an injunction, stating (at page 322):

"The Government [movant] has not sustained the burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated."



Under the authorities cited, it is not open to question that the burden of proof was on the Petitioners clearly to show that inequity and grievous wrong would result from continuing the injunction in force.

The Petitioners rely upon the naked change of law made by the 1951 Amendment to the Railway Labor Act<sup>1</sup> (45 U. S. C., Sec. 152, Eleventh), and they introduced no evidence whatsoever on whether there had been any change in the *factual* situation existing at the time of the entry of the original decree.

The Respondent employees, on the other hand, introduced evidence which clearly shows no change in the attitude of hostility on the part of union members toward non-union employees who are entitled to the protection of this injunction (R. 81-137). This bitterness and hostility was intensified as a result of a strike on the railroad in 1955. The evidence introduced by the non-union employees is relevant and is deserving of this Court's attention in the proper disposition of this case. Their uncontradicted evidence conclusively shows that one of the purposes of the Unions or the members thereof in seeking the modification and a union shop agreement is to force the non-union man out of his job (R. 90, 91, 92, 97, 99, 106-107).

The testimony of these men, many of whom suffered abuse and indignities, does not simply illustrate some isolated instances occurring during the heat of the 1955 strike. It very realistically shows the attitude

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<sup>1</sup>The effect of the 1951 Amendment upon the consent decree involved in this case is argued separately by this Respondent in Section "C", *infra*.

and feelings of hostility, bitterness and resentment on the part of Petitioners' members toward non-union employees who worked during the 58-day strike, and toward union employees who worked during the strike and who were either expelled from the unions or relinquished their membership therein as a result of it (R. 83, 108, 109, 117, 124, 134, 135, 136).

As stated by one witness (R. 90-92):

"Q. Now, Simon, last December, that is December of 1957, was any remark made to you or in your presence about holding your job?

A. Yes, sir, up in my locker room, since this letter has been out, they would never tell you anything, but they always talking where you could hear it, as soon as this injunction is mortified (sic), we will get all the scabs. They said that on the 2nd of January, I heard a gang of them saying the same thing, on the 2nd of January, said, as soon as this injunction is dissolved, we are going to get all the scabs."

These reprehensible indignities inflicted upon these employees were for the purpose of forcing them to relinquish their employment. Nor can the conclusion be evaded that these feelings and attitude of hostility and bitterness toward these non-union employees have continued and exist now (R. 102, 103, 118, 129). Another witness testified (R. 102):

"Q. . . . do you think the feeling demonstrated by the actions you have told us about has been cured or whether it still exists as of today?

A. It exists today. They are very careful because at first they were not, and after some of them were apprehended and disciplined, they became very careful about it and some of them have eliminated it, but it is a definite feeling against these people, that is very strong."

It was made clear that these acts involved the shop craft employees who are members of the class concerned here with the present motion for modification, the witness further stating (R. 103):

"Q. Did these acts you described occur with respect to shop craft employees or operating employees?

A. Shop craft employees."

It is clear that this attitude of hostility toward these non-union employees still prevails (R. 102, 103, 118, 129). This is the plain import of the letter of Jake Paschall, General Chairman, Brotherhood of Locomotive Firemen and Enginemen, to certain Birmingham, Alabama lodges, dated February 6, 1958 (R. 146-147). This exhibit quotes a letter dated February 5, 1958, written by General Chairman Ray Abner of the International Brotherhood of Firemen and Oilers, one of the Petitioners here (R. 16), who refers to the "scabs" from Birmingham, some by name, "Shopmen Dave Carter, Sam Jones and Sam Durant", who Mr. Abner stated testified at the hearing on Petitioners' motion for modification on February 3, 1958. The tenor of Mr. Abner's statements, written two days after the hearing, reflects the attitude of one who is interested,

not in rectifying the threats, mistreatment and abuse, but in further kindling hostility toward these men for their even having testified about it.

As stated by the District Court (R. 79), the Unions made no attempt to rebut the testimony given as to the bitterness and hostility that exist between the employees who are union members and the non-union employees. In their brief before this Court (p. 16), the Petitioners admit that the foregoing facts (R. 81-137) are not in dispute, or *arguendo* concede them, and argue that they are nevertheless entitled to the requested modification as a matter of law. They argue (Brief, p. 14) that what would remain of the injunction would sufficiently protect the employees against hostile discrimination. The Petitioners' position is remarkable for its boldness and is an affront to the conscience of a court sitting in equity. But passing that point for the moment,<sup>1</sup> we call attention to the fact that the District Court thus effectively answered this argument of Petitioners (R. 79):

"Counsel for the unions insist that any threat of reprisal from that source could be avoided by suitable provision in the judgment or order of modification in addition to the safeguard provided in the 1951 Amendment to the Railway Labor Act. *The circumstances proven do not convince the Court that such supervision of the conduct of a union of its affairs among its own membership, as such a provision might entail, should be undertaken.*" (Emphasis added.)

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<sup>1</sup>This is dealt with at pp. 51-54, *infra*.

This Court, in *United States v. Swift & Company, supra*, stated (at page 119):

“The difficulty of ferreting out these evils and repressing them when discovered supplies *an additional reason why we should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be.*” (Emphasis added.)

The Petitioners have made no showing that they are victims of oppression or grievous wrong. In the face of the uncontradicted facts showing the abuse and continuing threats of discrimination toward the non-union employees, the Unions make the untenable argument (Brief, p. 28) that equity *compels* the modification sought; otherwise, they contend, they are *deprived of income* by a continuation of the injunction. So long as the non-union employees remain the victims of such oppression and hostility affecting their very livelihood as the record of this case shows, the Unions' claim of loss of income, under the facts and circumstances of this case, is one completely without weight on the scales of equity. This Court, in *United States v. Swift & Company, supra*, also stated (at pages 117-118):

“ . . . The question is not whether a modification as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. *The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect.*”

“ . . . No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression,” (Emphasis added.)

This claim of the Unions, that the grievous wrong done to them by a continuation of the present injunction consists of a deprivation of income from the employees who are not members of the Union, points unerringly, we submit, to the real object of the requested modification. The additional income could only be obtained by the Unions by the establishment of a union shop in their crafts, *in which event the class of non-union employees for whose protection the injunction was sought and entered would be obliterated. What would then remain of the injunction would be a decree purporting to protect the rights of a non-existent class.* Thus, it is apparent that the real effect of granting the modification sought would be to vacate the entire decree—it would thwart the basic purpose of the original decree and confirm the Unions and their members in the discrimination which the injunction was intended to dispel.

In *United States v. Radio Corporation of America, et al.*, 46 F. Supp. 654 (D., Del.), the Court, speaking of modification of an injunction, stated:

“It would seem, however, that such modification must be consistent with the purpose of the original decrees and calculated to effectuate and not thwart their basic purpose. *United States v. International Harvester Co.*, 274 U. S. 693, 702,



47 S. Ct. 748, 71 L. Ed. 1302; *Chrysler Corporation v. United States*, 316 U. S. 556, 62 S. Ct. 1146, 86 L. Ed. . . . ."

Thus, before modification may be made, it must be shown that such modification would serve to effectuate rather than thwart the basic purpose of the original decree. Please see also *Walling v. Harnischfeger Corporation*, 142 F. Supp. 202, 204 (E.D., Wis.); *United States v. Besser Manufacturing Company*, 125 F. Supp. 710 (E.D., Mich.); and *Morse-Starrett Products Company v. Steccone*, 205 F. 2d 244 (C.A. 9th).

Furthermore, the Unions were a party to the agreed settlement in this case and entered into an agreement by which they may well have saved a substantial sum by reason of the non-union employees' relinquishment of their claims for damages resulting from claimed discrimination over a period of several years. Wisely or unwisely, the Unions submitted to these restraints.

Petitioners argue (Brief, p. 27, n. 6) that "none of the acts complained of or conduct enjoined could be consummated without its [the Railroad's] collaboration"; that "hirings, firings, promotions, exercise of seniority rights, assignment of overtime work, etc., are necessarily administered by the employer, not the Union." The Petitioners question the right of the Railroad to be heard at all in opposition to the proposed modification (Brief, p. 27).

Even though this Respondent is subject to the restraints of the injunction, there can be no question that the impetus of the discrimination against non-

union employees was provided by the Unions. This entire controversy arose, not because *Union* employees were the subject of discrimination, but because *non-union* employees were the victims of hostile discrimination. It is specious and untenable for counsel to imply that the Railroad has been the instigator of the discrimination and that the Unions are merely innocent victims entangled in a web of circumstances. The entire tenor of this litigation from its inception refutes such implied accusations. Furthermore, as illustrative of the situation, reference is made to Rule 11 of the Agreement effective September 1, 1943, between the Railroad and its employees represented by these Unions:<sup>1</sup>

**"RULE 11. DISTRIBUTION OF OVERTIME.**

"11(a) When it becomes necessary for employees to work overtime they shall not be laid off during regular working hours to equalize the time.

"11(b) Overtime will be distributed as equally as possible among the different classes of employees of each department or sub-department as far as the character of work will permit.

"11(c) Record will be kept of overtime worked in order to distribute the overtime as equally as possible.

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<sup>1</sup>Rule 11 is the rule referred to in paragraph 1.8 of the original complaint herein (R. 22-23). Paragraph 1.8 of the complaint does not set out the rule verbatim, but the rule is a part of the record in this case, being a part of Exhibit D to the Railroad's original answer herein. That exhibit is, of course, available to the Court if it wishes to call for the full record below. Rule 11 has been renumbered as Rule 12 in the collective bargaining agreement currently in effect between the Railroad and its employees represented by these unions.

**"NOTE:** This rule refers only to work performed outside of regularly assigned hours at punitive rate of pay. Overtime-call lists shall be drawn up by mutual agreement between the officer in charge and the committee."

The "committee" referred to in the above Rule consists of Union representatives whose responsibility for proper distribution of overtime work was and is no less than that of the Railroad's. It is not difficult to envision the problem encountered by the Railroad in dealing with a "committee" of Union members determined to favor other members of the Union in the assignment of overtime at the punitive rate of pay. The Railroad does not complain of an injunction that insures that there will be no hostile discrimination in applying the Rule.

The Railroad has a real and direct interest in this case in that its employees are involved. At the present time (R. 129) it is necessary for the Railroad to maintain special police at various points on its system because of the danger of non-union men being harmed on their way to and from work. The Railroad (R. 129-130) has received petitions from over 2,000 employees and cards from 800 shop-craft men protesting any change in this injunction. The record in this case is replete with evidence of efforts of the Unions or their members, by means of force and violence, to frighten non-union men from the job (R. 90, 91, 92, 97, 99, 106-107). Efforts are still being made by the Unions to force the Company to by-pass non-union men when promotions are made (R. 114-117) and work

is assigned (R. 117, 118, 119, 120). Such conduct as this affects the day-by-day operation of the Railroad and its ability to render the service it is required to perform by law.

Secondly, the Railroad was a party in good faith to the agreed settlement of this case and it has endeavored to keep its agreement. It has an interest in seeing that the Unions also abide by the agreement. In the District Court the Railroad opposed the modification of the injunction by motion (R. 44-46) and response (R. 51-56).

Accordingly, there is no substance in Petitioners' contention, the Railroad being a party to the action and having a real and substantial interest in it. *Bennett v. Langworthy*, 49 F. 2d 574, 575 (C. A. 8th).

The Petitioners contend (Brief, p. 11) that the effect of the denial of the requested modification is to maintain an everlasting prohibition against a union-shop agreement and to perpetuate a restraint against conduct now lawful. Such a contention discloses a misunderstanding by the Petitioners of the decisions below, and is tantamount to an admission by the Unions that they will perpetually practice abuse and discrimination. The decisions of the Courts below are simply to the effect that *upon the present record* a modification of the injunction should not be granted. The Unions did not introduce any evidence, and the reason they did not do so must have been that they well knew that animosity and bad faith towards the non-union workers still exist.

Under the authorities we have cited, it is clear that the burden of proof was on the Petitioners to show that inequity and grievous wrong would result from continuing the injunction in force. No change in the factual situation having been shown—indeed, it having been shown that present conditions are, if anything, worse than those which obtained at the time the injunction was agreed upon—there was no justification for any modification of the injunction.

**C. Since There Was No Change in the Factual Situation Justifying a Modification of the Injunction, the Change of the Law Made by the 1951 Amendment to the Railway Labor Act (45 U. S. C., Sec. 152, Eleventh) Does Not Compel the Modification Sought, Particularly Where, as Here, the Injunction Was Based Upon an Agreement of the Parties That the Prohibition of the Union Shop Was To Have Prospective Application.**

The Petitioners' entire case is that the 1951 Amendment to the Railway Labor Act *compels* the modification sought, as a matter of law, and that, regardless of an affirmative showing of continued hostility and threats of discrimination toward those non-union employees subject to the protection of the decree, the District Court had no discretion to deny the modification sought.

We need not argue the broad and abstract proposition whether a change of law is ever sufficient to authorize the suspension or modification of an injunction previously granted. *The question here is much narrower and involves a determination whether a specific*

*change of law, namely, the 1951 Amendment to the Railway Labor Act, alone, and under the facts and circumstances of this case, compels the modification demanded by the Petitioners.* Earlier portions of this brief have presented some of the facts and circumstances of this case. Others remain to be considered.

The existence of the agreement between the parties is a fact which cannot be ignored in weighing the equities of the parties.

The Petitioners argue (Brief, p. 23, n. 5) that there is no agreement involved in this case and that all they did was simply to indicate their approval on the consent decree. The Petitioners were parties to the agreed settlement of this case with the non-union employees, as surely as was the Railroad.

There can be no question concerning what occurred in 1945. A complete settlement of all issues in this case was agreed upon between the plaintiffs, the Union defendants and the Railroad defendant. Under date of December 1, 1945, the Union defendants, and the officers thereof, and the Railroad defendant, took a comprehensive release from the plaintiffs (R. 138-144). The release recited that "it is the mutual desire of all of the parties to said action to settle and dispose of all issues in dispute among them in the following manner" (R. 138). — The release enumerated three things that were to be done, the *first* one being: "The entering of a consent decree in the aforesaid action . . . , a copy of which consent decree is attached hereto" (R. 138). Following such recitals, the release provided that "in consideration of the sum of \$5,000 this day



paid to the undersigned by the defendants . . . and the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto", the plaintiffs executed the said release (R. 139). Pursuant to the terms of the release, the said decree, the first sentence of which discloses that it was "by consent and agreement of all parties to this action", was entered by the District Court on December 7, 1945, six days after the date of the release.

It is clear that the parties settled the entire controversy by providing, for the future protection of plaintiffs and the classes represented by them (non-union employees in the shop crafts), that Union membership would not be required as a condition precedent to employment benefits; and by providing, for the vindication of their rights in the past, that the relatively small monetary consideration recited should be paid.

At the time of the settlement of this case, in 1945, the National Labor Relations Act, applicable to other industries, permitted closed-shop contracts (Section 8(a)(3), National Labor Relations Act, 29 U. S. C. Sec. 158(a)(3)). Moreover, prior to 1945, the Railroad Unions, including the Petitioners, had begun exerting efforts to get the Railway Labor Act amended so as to provide for a union shop. This is disclosed by Presidential Orders, as well as the history and background of the Amendment, of which this Court can take judicial notice. *Dennis v. United States*, 339 U. S. 162, 169; *Bowles v. United States*, 319 U. S. 33, 35; 20 *Am. Jur.*; Evidence, Sec. 44, page 67.

Attention is especially invited to the Transcript of the Proceedings of the National Railway Labor Panel Emergency Board, Chicago, Illinois, 1943, Book II. On September 25, 1942, notices were served by the Unions on the railroads, including the Louisville and Nashville Railroad, demanding a union shop (Book II, page 2106). The railroads declined the demand on the ground that the existing Act prohibited union shops (45 U. S. C. Sec. 152, Fourth and Fifth). In order to resolve this issue along with demands for wage increases, the President, pursuant to 45 U. S. C. Sec. 160, created an Emergency Board and referred the matter to it. In the briefs filed with the Board, the Unions argued that there was nothing in the Railway Labor Act which prevented the Emergency Board from recommending that the Act itself be amended to provide for a union shop if such a procedure appeared to be the most feasible method of settling a dispute (Book II, pages 1979-1980, *supra*). They also urged that the emergency war powers of the President were such that by executive order or otherwise a union shop could be established in the industry (Book II, pages 1972-1976, *supra*). However, the Emergency Board and the President refused to accede to the Unions' demands.

Thus, when the consent decree was entered herein, the Unions had already begun urging a change in the law. Hence, the prospective language used (R. 36-38):  
 "... and they [the Railroad Company and the Unions] are further enjoined, in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the

defendant Unions, or that may be hereafter in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of defendant labor organizations, or any labor organization." The parties unquestionably had in mind future contracts, and they negotiated in such a manner that the consent decree would be effective as to such future contracts. The wording of the agreed decree manifested the clear intent of the parties that the non-union membership provision was to have prospective effect.

In arguing against the existence of any agreement, the Petitioners contend (Brief, pp. 11, 24, 25) that if the injunction in this case is based upon an agreement, and not the Railway Labor Act, the Court would have lacked jurisdiction to issue it under the Norris-LaGuardia Act. They rely upon *Graham v. Brotherhood of L. F. & E.*, 338 U. S. 232.

The complaint in this case was predicated upon hostile discrimination prohibited by the Railway Labor Act, and because of such prohibition the Court had jurisdiction to issue the decree notwithstanding the Norris-LaGuardia Act. We have not contended and do not now contend that the Court's jurisdiction was conferred by consent of the parties. The injunction was not issued because the Act did or did not permit the adoption of the union shop, but because the Act requires that all employees, union and non-union, be

treated without hostile discrimination. *Steele v. Louisville & N. R. Co.*, 323 U. S. 192; *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515.

The District Court (R. 77-78, 79-80) and the Court of Appeals (R. 152) found as a fact that such an agreement existed. Petitioners argue (Brief pp. 23, 24) that the Court's recognition of the agreement is a rejection of the ruling in *United States v. Swift & Company, supra*, that a consent decree can be modified. This is not correct. Both the District Court (R. 78) and the Court of Appeals (R. 152) explicitly recognized the power to modify.

While the *Swift* case teaches that the Court retains the power to modify a consent decree, it also clearly reveals that the fact that an agreement was made is not to be disregarded in weighing the equities involved and in determining the proper exercise of that power. In the *Swift* case, this Court reversed the lower court, which had granted the modification. This Court, in *Swift*, recognized an agreement, and though holding that the decree remained subject to the power of the court to modify, the Court attached considerable importance to the fact that the decree was a consent decree. This Court's opinion in *Swift* is replete with references to the fact that the parties agreed and consented to the decree. The following quotations are illustrative:

"We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition.

*Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court."* (pp. 116-117) (Emphasis added.)

\* \* \* \* \*

*"Its restraints, whether just or excessive, were born of that fear. The difficulty of ferreting out these evils and repressing them when discovered supplies an additional reason why we should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be."* (pp. 118-119) (Emphasis added.)

\* \* \* \* \*

*"Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed and the decree of a court confirmed the renunciation and placed it beyond recall."* (p. 119) (Emphasis added.)

The District Court and the Court of Appeals were correct in recognizing that the Unions, the Railroad and the non-union employees were all parties to a settlement agreement providing that the non-union employees of the crafts involved in this litigation would not be required to maintain union membership, under any collective bargaining agreement then in effect or that might thereafter be in effect between the Unions and the Railroad, as a condition precedent to employment.

The existence of such settlement agreement is a fact and must be considered along with the other facts and circumstances in this case in weighing the equities involved and in determining the proper exercise of the

Court's power to modify the decree. It was so considered by the District Court, and that Court, after weighing that fact and the other facts of the case, concluded that the injunction should not be disturbed. Its conclusion, made in the exercise of a sound discretion, should be respected by this Court.

The 1951 Amendment to the Railway Labor Act (45 U. S. C. Sec. 152, Eleventh) merely grants *permission* to the Carriers and the Unions to adopt a union shop if they so desire. The provisions of this amendment were not intended to be mandatory. Petitioners (Brief, pp. 21, 22) place much emphasis on the words "shall be permitted" in the amendment. The background and legislative history of this amendment reveal that these words were intended to be permissive only.

Prior to the adoption of the 1951 Amendment, the Railway Labor Act, as amended in 1934, 45 U. S. C. Sec. 152, Fourth and Fifth, contained prohibitions against any carrier interfering with the organization of its employees or with the right of an employee to join a labor organization of his choice. The carrier was prohibited from requiring any employee to agree to join or not to join a labor organization.

In 1951, Congress yielded to the pressure long exerted by the Unions and enacted Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. Sec. 152, Eleventh, granting *permission* to the Unions to negotiate with the Carriers for the adoption of a union shop. In the report of the Senate Committee which conducted hearings on this Bill, the following view was expressed



by proponents of the Bill (Vol. 2, *U. S. Code Congressional Service*, 1950, pages 4319, 4320):

*"The bill would not require the execution of union shop agreements; it merely permits the carriers and the representatives of their employees, through the voluntary process of collective bargaining, to include the union-shop provisions in their collective-bargaining agreements."* (Emphasis added.)

Senator Hill expressed the same viewpoint in managing the Bill on the Senate floor, where he stated as follows (*Cong. Rec.*, Vol. 96, p. 15882):

*"I should like to emphasize that the bill would not require and does not in any way make mandatory the execution of union-shop agreements; it merely permits the carriers and the representatives of their employees, through the voluntary process of collective bargaining, to include a union-shop provision in their collective bargaining agreements."* (Emphasis added.)

Again, in the same Volume of the Congressional Record, Senator Hill stated at page 16262:

*"The provisions of the bill are merely permissive. They do not require any railroad or labor organization to sign a contract. It makes it permissive for management and labor to sit around the bargaining table and, if they can work out an agreement, it is lawful for them to enter into it."*

In the same Volume of the Congressional Record, Senator Pepper of Florida, at page 16373 also stated that the union shop was permissive:

*"By the very language of the bill, railroad labor and management will be permitted to negotiate for a union shop. There is no compulsion in the bill for management and labor to do so. Management will be able amply to protect itself through free, voluntary bargaining on the subject."* (Emphasis added.)

Perhaps the clearest expression is the statement by Representative Sullivan which appears in the same Volume of the Congressional Record at page 17057:

*"We are being asked to permit unions and management to make agreements regarding the union shop. We are not being asked to vest in some Government board the authority to order union-shop agreements. We are not being asked to set up some new authority at great expense to the Government to administer some standards that will be set here. We are simply proposing to say to railroad management and railroad labor — 'If you fellows can get together on contracts of this sort and want to sign one it is all right.'" (Emphasis added.)*

Representative Wolverton thought the same thing when he stated in the Congressional Record, same Volume, page 17050, as follows:

*"We are not being asked to impose compulsory union-shop conditions by statute. The bill before us merely permits the collective-bargaining pro-*

cess to operate in that field. *It merely removes an existing statutory prohibition* against the negotiation of union-shop agreements if the carrier and the representatives of its employees are able to reach a meeting of the minds." (Emphasis added.)

From these quotations it will be seen that proponents of the amendment in both the House and the Senate clearly asserted that no compulsion was provided in the Bill.

This Court, in *Railway Employees' Department, A. F. L. v. Hanson*, 351 U. S. 225, has explicitly declared that the language of the 1951 Amendment is permissive and not mandatory. It said (page 231):

"The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. . . ."

The 1951 Amendment to the Railway Labor Act, being permissive only and not mandatory, does not render unlawful the agreement of the parties that the non-union employees in the shop crafts employed on this Railroad would not be required to maintain union membership, under any agreement then in effect or that might thereafter be in effect between the Union and the Railroad, as a condition precedent to employment benefits.

The validity of the agreement and the "Judgment, Decree and Injunction" as of the time they were made and entered in 1945 is certainly not subject to review

now. It is elementary that a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate or modify a judgment or decree cannot be used as a substitute for appellate review of the original consent decree. *Berryhill v. United States*, 199 F. 2d 217 (C. A. 6); *Morse-Starrett Products Company v. Steccone*, *supra*; *Title v. United States*, *supra*. This Court, in *United States v. Swift & Company*, *supra*, stated (page 119) :

“There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.”

Thus, the sole question here is one of determining the effect, if any, of the 1951 Amendment upon the previous agreement and consent decree. The agreement of the parties was lawful when made in 1945 prior to the amendment and it remains lawful today, notwithstanding the amendment. As the District Court very correctly stated (R. 79-80) :

“The railroad and unions went further to provide by their agreement that no such requirement of union membership should thereafter be in effect in any bargaining agreement in accordance with the provisions of the Railway Labor Act. The 1951 amendment to the Act did no more than make

negotiations for a union shop permissive, *Railway Employees' Dept. v. Hanson, supra*. The amendment did not nullify the agreement or the injunction. It did not prohibit an agreement between the railroad and the unions that a union shop should not exist. Hence, the Court leaves the parties as they agreed to be and to remain."

Today, under the Railway Labor Act, as amended in 1951, the parties could enter into precisely the same agreed settlement of the same type of case as they did in 1945. To illustrate, let us suppose that the complaint filed in this suit in 1945 had been filed today and that hostile discrimination was being practiced by the Unions and their members against non-union employees (the open shop being in effect) because of their non-union membership. As stated by this Court in *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768, 774:

"Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers . . . ."

Under the Railway Labor Act, in the absence of a union shop the plaintiffs today would be entitled to the same relief to which the plaintiffs in the present case were entitled. *Steele v. Louisville & N. R. Co., supra*. Under such supposed state of facts, in order to effect a settlement, the parties today could lawfully agree that union membership would not be required as a condition precedent to employment benefits. There-

fore, it is obvious that the 1951 Amendment has not changed the equities which prompted the Court to enter the decree in 1945 and that the Petitioners are not entitled to the modification *solely* because of this amendment. A mere change of law is not always sufficient to warrant modification of a judgment granting an injunction; and certainly the specific change of law involved in this case does not warrant—much less does it compel—the modification which Petitioners seek.

Some of the cases relied upon by the Petitioners have been shown, in earlier parts of this brief, not to support their position. We proceed now to show that other cases cited by them also fail to support it.

In *Coca-Cola Company v. Standard Bottling Company*, 138 F. 2d 788 (C. A. 10th), a consent decree had been entered against the Standard Bottling Company enjoining it from selling any products having in their names the word "Cola" or "Coca-Cola" or similar words. During the pendency of the injunction, a number of other companies in the territory began selling similar products, such as Pepsi-Cola, Cleo-Cola and Royal Crown Cola. In view of this change in the *factual* situation, a modification was made in the injunction. In the present case, however, there is no change in the *factual* situation concerning the discrimination at which the injunction was directed.

*Chrysler Corporation v. United States*, 316 U. S. 556, simply holds that where a decree is impossible of performance due to circumstances beyond the control of the parties, the injunction *may* be modified. The ruling in that case, moreover, has been limited by the



later case of *Ford Motor Company v. United States*, 335 U. S. 303, wherein this Court refused to make a "mechanical application" of the *Chrysler* case and stated that the moving party had the burden of showing good cause why a court of equity should grant relief from a carefully drawn decree ending years of litigation. Thus, the decisions below are clearly not contrary to the law contained in these two cases.

In *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U. S. 421, the basis for the subsequent dissolution of the injunction was merely a declaration by Congress that the bridge in question did not interfere with navigation, a fact which was as true at the time the injunction was issued as it was at the time it was dissolved. The injunction was dissolved, not because of a change in the statutory law in existence at the time the injunction was entered; rather, the subsequent Act of Congress was more in the nature of a declaration of a fact. Congress in effect said that, as far as it was concerned, the injunction should not have issued in the first place.

*Western Union Telegraph Company v. International Brotherhood of Electrical Workers*, 133 F. 2d 955 (C. A. 7th), is not in conflict with the decisions below. In that case, it was contended that the change of law made by enactment of the Norris-LaGuardia Act (29 U. S. C. Sec. 101; *et seq.*) justified the modification of the injunction against the labor unions. This case will be dealt with more completely in a subsequent portion of this brief.<sup>1</sup> It is sufficient at this time to point out

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<sup>1</sup>Please see pp. 52-54, *infra*.

that the modification sought was not granted, and that the Seventh Circuit, at page 959, was influenced by the admonition of this Court in the *Swift* case, *supra*, to the effect that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead the Court to change what was decreed after years of litigation."

The decisions of the lower courts in this case are not contrary to *Ladner v. Siegel*, 298 Pa. 487, 148 A. 699 (which was cited by this Court in the *Swift* case), because the *Ladner* case did not involve the question of a change of law alone but involved also the question of a change in the *factual* situation between the date of the issuance of the original decree and the motion for modification. The problem in that case involved the location of a garage and whether it could be used as a public garage. The surrounding property had, in fact, changed from residential to commercial during the interim between the issuance of the injunction and the motion for modification. The Pennsylvania Court thus set forth succinctly the formula for modification of an injunction (148 A. 702):

"The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, and (b) where the law, common or statutory, has changed, been modified or extended, and (c) where there is a change in the controlling facts on which the injunction rested." (Emphasis added.)

The Court in the *Ladner* case did not approve the modification of the injunction solely because of the change of law. The Court also considered a change in the controlling factual background, namely, that the residential district, in which so many apartment houses, hotels, schools and clubs were then located, was no longer so exclusively residential as to make a storage garage a nuisance *per se*. The Court, referring to the above formula, stated at page 702.

“It becomes apparent that the second and third reasons amply justify a modification of the decree, if there is nothing else to prevent it.”  
(Emphasis added.)

The injunction issued in *Santa Rita Oil Company v. State Board of Equalization*, 112 Mont. 359, 116 P. 2d 1012, 136 A. L. R. 757, involved a decree of the Montana Court which enjoined the levy and collection of state taxes on oil and gas production under a lease of trust patent Indian land, upon the sole ground that in extracting the oil and gas the plaintiff was an instrumentality of the federal government and thus immune from taxation by the state. The injunction was based solely upon earlier decisions of this Court holding that such taxes constituted an interference with governmental functions. Subsequently, this Court overruled its earlier decisions and held that such taxes did not, under the circumstances, constitute an interference with governmental functions, which, of course, removed the entire foundation of the injunction. The injunction in the present case, in contrast, was bot-

tomed upon the discrimination practiced against the non-union employees, and such discrimination ~~remains~~ unlawful. Also forming the basis of the injunction in the present case is the underlying agreement of the parties prohibiting provisions in any future collective bargaining agreement which would require the employee Respondents to join a union.

Analysis of the case of *National Electric Service Corporation v. District 50, United Mine Workers*, 279 S. W. 2d 808 (Ky.), will show that, as in the *Santa Rita* case, the injunction had been based *solely* on the law as it then existed, and this Court, by a subsequent decision, changed the law. Even in those circumstances, the Court of Appeals of Kentucky held that modification of the injunction was not a matter of absolute right but lay in the discretion of the trial Court.

Other decisions of equal import have held that for an injunction to be modified because of a change of law, the situation must have changed with respect to a *fact* which was the basis of, and material to, the original injunction. In *Degenhart v. Harford*, 59 Ohio App. 552, 18 N. E. 2d 990, an injunction had been issued restraining the defendant from maintaining and operating a funeral home in a residential district upon the grounds—

(1) that it was a nuisance; and

(2) that it was forbidden by city ordinance.

Subsequent to the entry of the injunction, the city modified its zoning ordinance so as to permit the main-

tenance and operation of a funeral home within a residential district. The Court refused modification of the injunction and held that the fact that the city had subsequently changed the law did not justify the modification. This ruling was based on the sound ground that the original ordinance was not the basis for the conclusion that the maintenance and operation of the home constituted a nuisance. By the same token, the injunction in this case was rested on the ground that there was hostile discrimination practiced by the defendants in relation to the non-union employees. Also forming a basis of the injunction in the present case is the underlying agreement of the parties. A change of law such as the 1951 Amendment, being permissive only, does not, by itself, compel the modification of the injunction.

Another case in point is *Sunbeam Corporation v. Charles Appliances*, 119 F. Supp. 492 (S.D., N.Y.). There, the rule is laid down as follows (page 494):

" . . . The mere change in decisional law upon which a permanent injunction was granted, in and of itself, will not support the opening or modification of the decree. The circumstances of the parties must so have changed as to make it equitable to do so. This indispensable ingredient is lacking in the case at bar."

The same rule should be applied here, for the moving Unions have sought modification of the consent decree upon the ground of a change of law only, a change which we have shown is permissive only and

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not mandatory. This, in and of itself, considering all of the other relevant facts and circumstances of this case, is not enough. Please see, also, *Morse-Starrett Products Company v. Steccone*, 205 F. 2d 244 (C. A. 9th).

As stated in *United States v. Radio Corporation of America*, 46 F. Supp. 654, 656 (D., Del.), while a Court may have power to modify injunctions upon a proper showing of a change of circumstances, such modification *must be consistent with the purpose of the original injunction and calculated to effectuate and not thwart its basic purpose*. *United States v. International Harvester Company*, 274 U. S. 693, 702; *Chrysler Corporation v. United States*, 316 U. S. 556. The modification here sought would thwart the basic purpose of the original decree and confirm the Unions and their members in the discrimination which the decree was designed to dispel. The Petitioners' suggestion to the District Court (R. 79) that the decree could be so modified as to incorporate protection for all activities other than the negotiation of a union-shop agreement is in reality a suggestion that a new decree be entered; for the negotiation of a union-shop agreement would obliterate the entire class the present decree was designed to protect. Such a new decree, to be effective, would require judicial supervision of the Unions' affairs, a task which the District Court properly declined to undertake in the circumstances proven (R. 79).

**D. The Motion to Modify the Injunction, on the Sole Ground of This Change of Law, Was Properly Denied Because the Uncontradicted Proof Establishes That the Moving Party Has Unclean Hands.**

The Petitioners here have sought relief by a motion filed pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, which prescribes a procedure for relief when “. . . it is no longer equitable that the judgment should have prospective application; . . .” The Unions have come into equity seeking equitable relief in this proceeding for modification. The maxim that one who seeks equity must come with clean hands is not a trite expression. On the contrary, the principle to which the maxim gives expression retains its significance and is firmly a part of our jurisprudence. Speaking of this maxim in *Precision Instrument Manufacturing Company v. Automotive Maintenance Machinery Company*, 324 U. S. 806, this Court stated (page 814):

“This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be ‘the abettor of iniquity.’ *Bein v. Heath*, 6 How. (U. S.) 228, 247. Thus while ‘equity does not demand that its

suitors shall have led blameless lives,' *Loughran v. Loughran*, 292 U. S. 216, 229, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. *Keystone Driller Co. v. General Excavator Co.*, 290 U. S. 240, 245; *Johnson v. Yellow Cab Transit Co.*, 321 U. S. 383, 387; 2 Pomeroy, *Equity Jurisprudence* (5th Ed.) Secs. 397-399.

"Accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor."

Petitioners have cited the case of *Western Union Telegraph Company v. International Brotherhood of Electrical Workers*, 133 F. 2d 955 (C. A. 7th). The case, however, does not support the modification here. On the contrary, it forcefully emphasizes additional grounds for denying the present motion.

In that case an injunction had issued in 1924 enjoining the Unions from interfering with the Company's business by means of a secondary boycott, the object of the Unions being to bring about the unionization of Western Union's employees. At the time of the entry of the injunction in 1924, the trial court believed that the Unions' activities involved in the case were prohibited by the Sherman Act. Subsequent to the entry of the decree, this Court held that such

activities as were involved were not violative of the Sherman Act; and the Norris-LaGuardia Act was passed. In 1941 the Unions filed a petition for modification based upon the change of law, the Unions contending that the Norris-LaGuardia Act nullified the 1924 decree. The District Court, being of the opinion that the Norris-LaGuardia Act had legalized many of the acts prohibited by the decree, "entered an order modifying the decree to conform with the Act." The Circuit Court reversed, stating (page 959):

"In the consideration of this question it is well to remember the admonition of the court in the Swift case, *supra*, 286 U. S. 119, 52 S. Ct. 460, 76 L. Ed. 999, that nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead the court to change what was decreed after years of litigation. In this connection we are permitted to examine and judicially notice the proceedings formerly had by the parties, *De Bearn v. Safe Deposit & Trust Co.*, 233 U. S. 24, 34 S. Ct. 584, 58 L. Ed. 833. From these records it appears that there was evidence tending to prove that appellees' agents resorted to destruction of appellant's property and made threats of violence upon appellant's employees. It is possible that the appellees have mended their ways and have turned over a new leaf and that such a showing may be made, but it has not been made by the record in the instant case; consequently, we believe that justice would be better served if the cause were remanded to the District Court to inquire into the good faith of the appellees and whether they come into court with clean hands.

"The order is reversed, and the cause is remanded with directions to proceed in accordance with this opinion."

There are additional reasons for denying the modification here sought which were not present in the *Western Union* case, *supra*: The present case also involves consideration of the *agreed settlement* of the case made by the parties. Also, in the present case the non-union employees for whose protection the decree was entered made an *affirmative and uncontradicted showing* that there was no change in the attitude of hostility manifested toward them by Petitioners' members; that efforts are still being made by the Unions' members to intimidate them and force them from their jobs and to cause them to be by-passed when promotions are made and work is assigned. The present record (R. 81-137) is replete with such evidence and has been dealt with in the earlier portions of this brief.

The discrimination by the Unions' members against the non-union employees protected by this injunction *remains a real and present threat to the livelihood of the latter*. Clearly, the Petitioners have sought equitable relief with unclean hands.

**VIII. CONCLUSION.**

For the foregoing reasons the Respondent, Louisville and Nashville Railroad Company, submits that the decisions of the District Court and the Court of Appeals are correct and should be affirmed.

Respectfully submitted,

JOHN P. SANDIDGE,  
WOODWARD, HOBSON & FULTON,  
1805 Kentucky Home Life Building,  
Louisville, Kentucky,

H. G. BREETZ,

W. L. GRUBBS,

M. D. JONES,

JOSEPH L. LENIHAN,  
908 West Broadway,  
Louisville, Kentucky,

*Counsel for Respondent, Louis-  
ville and Nashville Railroad  
Company.*



APPENDIX

**APPENDIX.****Railway Labor Act, 45 U. S. C. Section 152:**

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organi-

zations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dis-

pute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

**CERTIFICATE OF SERVICE.**

I, H. G. Breetz, one of the attorneys for Respondent, Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the first day of October, 1960, I served copies of the foregoing brief on the several parties as follows:

1. On petitioners by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, as follows:

Robert E. Hogan  
Kentucky Home Life Building.  
Louisville, Kentucky

Richard B. Lyman  
741 National Bank Building  
Toledo 4, Ohio

Schoene & Kramer  
165 K. Street, N. W.  
Washington 6, D. C.

Mulholland, Robie & Hickey  
741 National Bank Building  
Toledo 4, Ohio

2. On respondents, other than the Louisville and Nashville Railroad Company, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorney of record, as follows:

Marshall P. Eldred  
Brown & Eldred  
Board of Trade Building  
Louisville 2, Kentucky

---

H. G. Breetz

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JAMES R. BROWNING, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

No. 48

(Formerly October Term, 1959, No. 756)

SYSTEM FEDERATION NO. 91 RAILWAY EMPLOYEES'  
DEPARTMENT, AFL-CIO, et al.,

*Petitioners.*

VS.

O. V. WRIGHT, et al.,

*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit.

**REPLY BRIEF FOR PETITIONERS**

RICHARD R. LYMAN

741 National Bank Building  
Toledo 4, Ohio

ROBERT E. HOGAN

Kentucky Home Life Building  
Louisville, Kentucky

*Attorneys for Petitioners*

*Of Counsel:*

SCHOENE & KRAMER

1625 K. Street, N.W.  
Washington 6, D.C.

MULHOLLAND, ROBIE & HICKEY

741 National Bank Building  
Toledo 4, Ohio.



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

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SYSTEM FEDERATION NO. 91 RAILWAY EMPLOYEES'  
DEPARTMENT, AFL-CIO, et al.,

*Petitioners,*

vs.

O. V. WRIGHT, et al.,

*Respondents.*

---

**On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit.**

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**REPLY BRIEF FOR PETITIONERS**

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Most of the contentions advanced in the briefs of respondents are fully answered in our original brief herein, and we will not burden the Court with any lengthy repetition or rephrasing of our original argument. However, the lengthy and discursive form of respondents' arguments, as well as the misconceptions, irrelevancies and misrepresentations contained therein, prompt us to at least a brief endeavor to bring the issues back into proper perspective.

Because many of the arguments advanced by respondents are reiterated throughout their briefs, and even urged in their statements of facts, without regard to divisions of argument, they will be discussed here under headings indicating their subject matter, rather than by reference to specific sections of respondents' respective briefs.

## **ARGUMENT**

### **1. Nature and Effect of the Proposed Modification of the Injunction.**

Respondents' objections to modification of the injunction herein, as we pointed out in our original brief, rest to a considerable extent upon basic misconceptions of the nature and source of the rights involved, and misapprehension of the effect of the proposed modification, both as to what it would and would not do.

For example, the Railroad argues (brief, p. 9) that the purpose and effect of the requested modification is to enable the unions "to deprive the non-union men of their jobs," and that "This injunction has preserved their jobs." As shown in our original brief, injunctions are not the source of rights but simply remedies for their protection; and removal of the prohibitions of an injunction does not affect the substantive rights of the parties. The modification of the injunction proposed here could not, of course, subject anyone to loss of his job unless he voluntarily refused to comply with the minimal union membership conditions approved by Section 2, Eleventh of the Railway Labor Act (45 U. S. C., Sec. 151 et seq.).

Considerable discussion in respondents' briefs is devoted to completely irrelevant argument and citation of

cases dealing with "hostile discrimination" by the union and the company against minority segments of a craft, as in *Steele v. Louisville & Nashville Railroad Company*, 323 U. S. 192, and other cases involving racial discrimination. There is no discrimination, and no hostility, involved in an attempt by a labor organization to bring into its membership, on an equal basis, employees in the craft represented by it.

Respondents, other than the Railroad, argue that the purpose of the proposed modification is to open the door to discrimination against them, and that it would afford opportunities for "mistreatment" against which they are protected by the injunction in its present form.

They state (brief, p. 50) that should a union shop be negotiated, respondent employees would be taken into membership "and thereafter subjected to all manner of indignities and harassment." In the same vein the Railroad argues that the modification here sought would "confirm the unions and their members in the discrimination which the decree was designed to dispel" (brief, p. 26, 50).

How these things could be accomplished is not specified by respondents, and as we have emphasized the fact is that they could not be in view of the protection afforded by the proviso to Section 2, Eleventh (a) of the statute.

Respondents further urge, as they did in the courts below, that if all employees were to become members of the unions under a union shop agreement, the injunction could not effectively protect them against discrimination because it was designed to protect only non-union employees. As we pointed out to the courts below, if there were any doubt that the injunction protected against discrimination because of past, as well as present, non-mem-

bership, that doubt could be removed by attaching a simple condition to that effect, to the order granting the requested modification.<sup>1</sup> The District Court's conclusion (R. 79) that such a condition would place upon the court the burden of supervision of the conduct of the unions' internal affairs is patently without foundation. The injunction, as well as the requirements of law upon which it was based, purported to protect rights and benefits attendant upon employment, not union membership or the conduct of the union's internal affairs.

Respondents have argued and cited cases to the effect that on the motion to modify the injunction the court could not review its original decree. But the motion herein did not seek a review. The validity of the decree when originally entered was not challenged. Modification was sought only as to its future application. No question is involved of any attempt to apply Section 2, Eleventh, retroactively.

By virtue of the injunction respondents other than the Railroad have been protected for 15 years in the enjoyment of their "free-rider" status. The legal basis for such protection was terminated nine years ago by Congress. To ask the court to recognize this fact and modify the injunction accordingly, in its prospective operation, is not to relitigate the original issues, or to give retroactive effect to the statutory amendment.

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<sup>1</sup>Rule 60 (b) of the Federal Rules of Civil Procedure authorizes the court to grant a motion for modification "upon such terms as are just."

## **2. The Consent Decree Is Not to be Treated as an Agreement Precluding Subsequent Modification of the Injunction.**

While not seriously questioning the proposition that the consent nature of a decree of injunction does not alter its status as a judicial act, nor render it immune from subsequent modification, respondents persist in arguing here, as they did in the courts below, that there was in this instance an agreement between the parties never to require union membership as a condition of employment, and that "the agreement" supports a refusal to modify the injunction. This contention, in varying forms, is reiterated throughout both briefs of respondents, and is in fact the keystone of their arguments.

This line of argument apparently succeeded in convincing the District Court that there was indeed some such contractual undertaking, separate and apart from the decree of injunction. Such, of course, was not the case. (See footnote 5, p. 23. of our original brief.) The settlement here was no different than in any case which is terminated by the entry of a consent decree. The only "agreement" was the agreement that the suit would be settled by entry of the decree, payment to plaintiffs of \$5,000, and plaintiffs' release of claims of monetary damages.

That such a settlement does not preclude modification of the injunction was pointed out in our original brief, pp. 22-25. We reiterate the statement there made that if the reasoning of respondents were to prevail, all consent decrees would be immune from modification. Plainly and unequivocally to the contrary is this Court's statement, in *United States v. Swift & Co.*, 286 U. S. 106, 115, that:

"We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act."

### **3. Amendment of the Statute Was a Sufficient Change in Circumstances to Entitle Petitioners to Modification of the Injunction.**

Respondents have argued at great length that the "only" change in circumstances relied on for modification of the injunction is a change in the law; that no change in factual circumstances has been shown; and hence that the moving parties failed to sustain their "burden of proof."

The authorities cited in our original brief amply support the right to obtain modification on the basis of a change in the law which, as here, completely alters the right previously protected.

The right to modification under such circumstances is not brought into question by the numerous cases cited by respondents, where modification was sought *not* on the basis of a change in the law but because of alleged changes in the factual circumstances of the parties, and denied by the courts for lack of sufficient, or material, changes of fact. Nor is there any relevancy in the cases discussing the issue of burden of proof, for respondents do not question the change in the law which is the basis for the instant motion.

The cases of *Degenhart v. Harford*, 59 Ohio App. 552, 18 N. E. (2d) 990, *Western Union Tel. Co. v. International Brotherhood, Etc.*, 133 F. (2d) 955, and *Sunbeam Corp. v. Charles Appliances*, 119 F. Supp. 492, relied on by respondents, all actually support our position because of the reasoning applied by the courts, modification of an in-



junction based on changes in the law being denied only insofar as there remained some other basis for the injunction which was unaffected by the change in the law. Thus in the *Degenhart* case, the decree had sustained two separate causes of action, one of which, the nuisance theory, was unaffected by amendment of the zoning ordinance. In our case there was no basis for the injunction separate and apart from the Railway Labor Act which would support its continuance after the change in the statute.

In the *Western Union* case the court expressly recognized that "the injunction will be vacated or modified where the law has been changed making acts enjoined legal"; but because the original proceedings had shown some destruction of property and threats of violence by defendants, which of course had not been legalized by the statutory changes and would have constituted independent grounds for the injunction, the case was remanded for inquiry into the current good faith of defendants before a modification would be granted.

In the *Sunbeam* case, also involving separate and independent grounds for continuance of the injunction, the court said,

"In essence, therefore, the movant's position is that it be relieved of restraint to enable it to again engage in a practice *that could be promptly restrained.*"

No such statement can be made with respect to the present situation. Here the moving parties sought removal of a restraint against conduct now expressly authorized by statute, and that clearly could not be enjoined in a new proceeding.

#### **4. There Is No Showing of Unclean Hands to Support Refusal to Modify the Injunction.**

A great amount of time and effort was devoted by respondents, in testimony introduced below as well as in their briefs, to a showing of "hostility," "bitterness," "antipathy," etc., among the Railroad's employees. This is relied on as showing that these petitioners did not come before the court with "clean hands," that respondent employees would suffer "grievous wrong" by modification of the injunction, and that the basic purpose of the original decree would be thwarted.

The irrelevance of this evidence was pointed out in our original brief, pp. 25-28. The bitterness and hostility involved was not between union and non-union employees, but between employees in an economic strike, in 1955, and those employees, both union and non-union, who remained at work during the Railroad's efforts to break the strike. Such a situation inevitably generates antipathy among employees. However, it had no relation to the 1945 injunction against discrimination in the matter of employment benefits, nor to its modification to permit negotiation of Congressionally approved union security agreements.

As to the question of grievous wrong, respondent employees have for years enjoyed the benefits of collective bargaining by petitioner labor organizations, while remaining aloof from any contribution of moral or financial support to the activities from which they have profited. It is the prospect of termination of this preferred status, loss of their immunity as "free riders," and being called upon to contribute equally with their fellow employees to the cost of obtaining these benefits, that they here describe as a "grievous wrong."

Finally, the injunction was based and could be based only upon the Railway Labor Act, and its only "basic purpose" was to afford a remedy for protection of rights guaranteed by that Act. That basic purpose will not be "thwarted," but rather preserved, by modification of the injunction to conform to Congressional changes in the body of rights encompassed by the Act.

### CONCLUSION

The statute was the only foundation for the injunction sought to be modified. There is no separate or side agreement guaranteeing respondent employees perpetual immunity from requirements of union security agreements. The statute has been changed, making inequitable the continued application of the injunction in its present form. It has indeed become an instrument of "wrong and oppression," in that it prohibits petitioners from engaging in lawful conduct, and affords respondents remedies and immunities to which they have ceased to be legally entitled. It is accordingly submitted that petitioners are entitled to the relief sought, as indicated in our original brief.

Respectfully submitted,

RICHARD R. LYMAN  
741 National Bank Bldg.  
Toledo 4, Ohio

*Of Counsel:*

SCHOENE & KRAMER  
1625 K. Street, N.W.  
Washington 6, D. C.

ROBERT E. HOGAN  
Kentucky Home Life Bldg.  
Louisville, Kentucky

MULHOLLAND, ROBIE & HICKEY  
741 National Bank Bldg.  
Toledo 4, Ohio.

*Attorneys for Petitioners*

**PROOF OF SERVICE**

I, Richard R. Lyman, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of November, 1960, I served copies of the foregoing Brief for Petitioners on the several parties thereto as follows:

1. On Respondent Louisville and Nashville Railroad Company by mailing copies in duly addressed envelopes, with first class air mail postage prepaid, to its attorneys of record, as follows:

John P. Sandidge,  
Woodward, Hobson & Fulton  
1805 Kentucky Home Life Building  
Louisville, Kentucky.

H. G. Breetz,  
Louisville and Nashville Office Building  
Ninth & Broadway  
Louisville, Kentucky.

2. On Respondents other than Louisville and Nashville Railroad Company by mailing a copy in a duly addressed envelope, with first class air mail postage prepaid, to their attorney of record, as follows:

Marshall P. Eldred,  
Brown & Eldred  
Board of Trade Building  
Louisville 2, Kentucky.

Richard R. Lyman

# SUPREME COURT OF THE UNITED STATES

No. 48.—OCTOBER TERM, 1960.

System Federation No. 91, Rail-  
way Employees' Department,  
AFL-CIO, et al., Petitioners,

v.

O. V. Wright, et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Sixth Circuit.

[January 16, 1961.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

By a complaint filed on July 16, 1945, in the United States District Court for the Western District of Kentucky, 28 nonunion employees of the Louisville and Nashville Railroad began an action for declaratory relief, an injunction, and damages against the railroad and a number of unions representing its employees. Particularly relevant to the complaint were those provisions of the fourth and fifth paragraphs of § 2 of the Railway Labor Act<sup>1</sup> which make it

"unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . ."

and which forbid any carrier from requiring "any person seeking employment to sign any contract or agreement promising to join . . . a labor organization. . . ." Also relied upon was the duty of the exclusive bargaining agent

<sup>1</sup> 45 U. S. C. § 152.

2      SYSTEM FEDERATION v. WRIGHT.

to represent fairly and without discrimination all members of the class represented. See *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192. The factual allegations set forth a pattern of discriminations effected by the railroad and the defendant unions against nonunion employees.

By a settlement agreement dated December 1, 1945, the 28 plaintiffs released the railroad and union defendants from all claims<sup>2</sup> or actions then accrued "in consideration of the sum of \$5,000 this day paid to the undersigned . . . and the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto. . . ." The attached decree was adopted by the District Court on December 7, 1945. After detailing and then enjoining a number of specific discriminations on the basis of union status, the decree provided that the defendants

"are further enjoined, in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may be hereafter in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of defendant labor organizations, or any labor organization;"

The District Court retained jurisdiction over the matter "for the purpose of entering such further orders as may be deemed necessary or proper."

In 1951 the Railway Labor Act was amended to permit, under certain circumstances, a contract requiring a union

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<sup>2</sup> Each of the 28 plaintiffs had claimed \$5,000 in damages.



shop.<sup>3</sup> In order to avail themselves of the newly granted statutory privilege, in 1957 the petitioners filed in the District Court a motion under Rule 60 (b) of the Federal Rules of Civil Procedure<sup>4</sup> asking for a sufficient modification of the consent decree to make clear that it

"shall have no prospective application to prohibit defendants, or any of them, from negotiating, entering into, or applying and enforcing, any agreement or agreements authorized by Section 2, Eleventh, of the Railway Labor Act, as amended January 10, 1951."

The motion, which was opposed by the railroad and its suing employees (respondents here), was denied after a hearing at which was presented un rebutted evidence of assaults, destruction of property, and various other malicious acts directed by members of the union at any employee (union or nonunion) who had worked during a 58-day strike in 1955. The District Court acknowledged its authority to modify the consent decree but declined to do so, primarily out of regard for the fact that the unions (petitioners here) had consented by the decree not to have a union shop then or in the future, an undertaking which the District Court considered was not unlawful either before or after the 1951 amendments.<sup>5</sup> The court stated:

"It is to be remembered that the provisions of the Railway Labor Act made illegal a union shop in 1945,

<sup>3</sup> 45 U. S. C. § 152 Eleventh. See *Railway Employees' Department v. Hanson*, 351 U. S. 225.

<sup>4</sup> The relevant provisions of Rule 60 (b) are as follows: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

<sup>5</sup> In the view we take of the case we need not consider whether such a commitment of indefinite duration is valid.

when the injunction was agreed upon. Hence, it was then unnecessary for the railroad and the unions to agree, as they did, that the non-union members should not then be required to join or maintain membership in any of their craft unions as a condition precedent to employment. The law so prohibited, Section 152, Fourth and Fifth, Title 45, United States Code, Railway Labor Act. The railroad and unions went further to provide by their agreement that no such requirement of union membership should thereafter be in effect in any bargaining agreement in accordance with the provisions of the Railway Labor Act. The 1951 amendment to the Act did no more than make negotiations for a union shop permissive, *Railway Employees' Dept. v. Hanson*, supra. The amendment did not nullify the agreement or the injunction. It did not prohibit an agreement between the railroad and the unions that a union shop should not exist. Hence, the Court leaves the parties as they agreed to be and to remain." 165 F. Supp. 443, 449.

Though making it clear that evidence of continued union hostility against nonunion employees was not decisive, the District Court gave some weight to the administrative difficulty of preventing unlawful discriminations against nonunion employees that might be facilitated if there were a union shop. The Sixth Circuit affirmed "for the reasons set forth in the opinion of Chief Judge Shelbourne" in the District Court. 272 F. 2d 56. We granted certiorari because of the importance of the issues involved.

— U. S. —

At the outset it should be noted that the power of the District Court to modify this decree is not drawn in question. That proposition indeed could not well be disputed. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18

How. 421; *United States v. Swift & Co.*, 286 U. S. 106; *Chrysler Corp. v. United States*, 316 U. S. 556. In the *Swift* case, Mr. Justice Cardozo put the matter thus, at 114:

"We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent . . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. *Ladner v. Siegel*, 298 Pa. St. 487, 494, 495."

There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief. Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided. Nevertheless the court cannot be required to disregard significant changes in law or facts if it is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co.*, *supra*, at 114-115. A balance must thus be

struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances.

Where there is such a balance of imponderables there must be wide discretion in the District Court. But discretion is never without limits and these limits are often far clearer to the reviewing court when the new circumstances involve a change in law rather than facts. When the decree in this case was originally made, union shop agreements were prohibited by the Railway Labor Act and thus constituted in themselves a form of statutorily forbidden discrimination. Congress has since, in the clearest terms, legislated that bargaining for and the existence of a union shop contract, satisfying the conditions provided in § 2 Eleventh of the Railway Labor Act, is not forbidden discrimination by union or employer. Congress has therefore determined that whatever ways such a union shop arrangement facilitates other, unauthorized discriminations must be borne as inescapable incidents of a legislatively approved contract term.

Had the 1945 decree simply represented relief awarded by the District Court after a trial of the action instituted by petitioners, there could be little doubt but that, faced with the 1951 amendment to the Railway Labor Act, it would have been improvident for the court to continue in effect this provision of the injunction prohibiting a union shop agreement as being unlawful *per se*, or its use as an instrument to effectuate other statutorily forbidden discriminations. That provision was well enough under the earlier Railway Labor Act, but to continue it after the 1951 amendment would be to render protection in no way authorized by the needs of safeguarding statutory rights, at the expense of a privilege denied and deniable to no other union. This conclusion would not be affected by the circumstance, which the District Court here found, that the unions' hostility to nonunion employees still con-

tinued, for any discriminations that might be facilitated by the union shop clause have been legislatively determined to be an expense more than offset by the benefits of such a provision.

What seems plain to us in reason, as to a litigated decree, is amply supported by precedent. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, *supra*, this Court was also required to deal with the effect upon an outstanding injunction of subsequent congressional action. The Court had earlier held that a bridge across the Ohio River obstructed navigation in such a way as to be in conflict with certain Acts of Congress regulating navigation on the river. The decree "directed that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement." A later Act of Congress declared the bridge to be a lawful structure in its existing position and elevation. The injunction was dissolved, the Court saying, 18 How., at 430-432:

"So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of law. . . . But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot

be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree. Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted but that the defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?"

The principles of the *Wheeling Bridge* case have repeatedly been followed by lower federal and state courts.\* We find no reason to recede from them.

That it would be an abuse of discretion to deny a modification of the present injunction if it had not resulted from a consent decree we regard as established. Is this result affected by the fact that we are dealing with a consent decree? Again we start with the *Swift* case, *supra*, where the Court held, at pp. 114-115:

"The result is all one whether the decree has been entered after litigation or by consent. . . . In either

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\* In *McGrath v. Potash*, 199 F. 2d 166, after Congress passed a statute excluding from the requirements of the Administrative Procedure Act deportation proceedings, the District of Columbia Circuit vacated an injunction against the Government requiring compliance with that Act. There are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction. *E. g.*, *Lardner v. Siegel*, 298 Pa. 487 (whether a garage in a residential district is a nuisance); *Santa Rita Oil Co. v. State Board of Equalization*, 112 Mont. 350 (what federal instrumentalities are exempt from state taxation); *Coca-Cola Co. v. Standard Bottling Co.*, 138 F. 2d 788 (whether the use of the word "cola" infringed Coca-Cola's trademark); and see *Western Union Tel. Co. v. International Brotherhood*, 133 F. 2d 955 (whether ordinary strikes are forbidden by the Sherman Act and what picketing can constitutionally be enjoined).



event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act. . . . But in truth what was then adjudged was not a contract as to any one. The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."

This Court has never departed from that general rule. We continue to adhere to it because of the policy it expresses. The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. Frequently of course the terms arrived at by the parties are accepted without change by the adopting court. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. The court must be free to continue to further the objectives of that Act when its provisions are amended.

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<sup>2</sup> In *Coca-Cola Co. v. Standard Bottling Co.*, 138 F. 2d 788, 790, a Circuit Court could say with some certainty: "We know of no case which holds that a consent decree imposing a continuing injunction deprives the court of its supervisory jurisdiction in the matter."

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The parties have no power to require of the court continuing enforcement of rights the statute no longer gives.

The record leaves no room for doubt that the parties in fact attempted to conform the consent decree to the dictates of the Railway Labor Act as it then read. We can attach no weight to either of the two factors that led the lower courts to find that the parties had bargained, free of the requirements of the Act, for an injunction serving only their own interests. The first factor—that an independently arrived at contract rather than a decree effectuating rights accorded by the Act must have been contemplated because the unions agreed to equitable relief when their acts were already declared unlawful by statute—ignores completely the fact that this was precisely the relief sought in the complaint filed by the 28 plaintiffs and the relief that had been granted after litigation in *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, and in *Graham v. Brotherhood of Firemen*, 338 U. S. 232. The second factor—that the unions agreed to be bound as to bargaining agreements that might later be in effect as well as the contract then in effect—ignores the fact that the parties, in all likelihood, meant only to cover any later bargaining agreements under the Act as it read at the time of the consent decree.\*

The type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree which arise out of the fact that the court will not continue to exercise its powers thereunder when a change in law or facts has made inequitable what was once equitable. The parties could not become the conscience

\* We consider unpersuasive the argument of the railroad that in 1945 there was already on foot a movement to amend the Railway Labor Act so as to permit union shop agreements.

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of the equity court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute.

The judgment of the Court of Appeals must be reversed, and the case remanded to it for further proceedings consistent with this opinion.

*It is so ordered.*

Mr. JUSTICE STEWART took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES

No. 48.—OCTOBER TERM, 1960.

System Federation No. 91; Rail-  
way Employees' Department,  
AFL-CIO, et al., Petitioners:

v.

O. V. Wright, et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Sixth Circuit.

[January 16, 1961.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE FRANK-  
FURTER and MR. JUSTICE WHITTAKER CONCUR, dissenting  
in part.

This controversy commenced in 1945 prior to the time  
when so-called union shop agreements were authorized by  
Congress. Act of Jan. 10, 1951, 65 Stat. 1238, 45 U. S. C.  
§ 152 Eleventh. Since the date of that law, which we  
upheld in *Railway Employees' Dept. v. Hanson*, 351  
U. S. 225, employees and carriers *may* negotiate that type  
of agreement, though they are not required to do so. *Id.*,  
p. 231. Prior to that date, however, a union shop was  
barred by law in this industry; and a union that dis-  
criminated against nonunion members was accountable to  
them. See *Steele v. Louisville & N. R. Co.*, 323 U. S.  
192, 207.

Twenty-eight nonunion members sued petitioners, in  
1945, claiming damages in the amount of \$140,000. The  
complaint to state a class action. But the case never came  
to trial. A settlement was reached which provided for  
(a) the payment of \$5,000 in cash; (b) the waiver and  
release by the 28 plaintiffs of all their claims; and (c) a  
consent decree which would protect "the undersigned"  
against future acts of discrimination by petitioners.

The consent decree did not purport to protect *future*  
employees. By its terms it protected only "the plaintiffs

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in this action and all other employees of the defendant railroad employed in" designated crafts or classes and not members of the union. The petitioners agreed to refrain from discriminating "against the plaintiffs and the classes represented by them."

I do not think the consent decree, read in light of the settlement, did more than settle claims of *then-existing employees*. Employees, hired in the future, were by its terms not included. Yet apparently a host of them have intervened, seeking the protection of the *status quo* created by that decree. I use the word "apparently" because the record does not show which intervenors were on the payroll of the carrier in 1945. Those who became employed after that date plainly are not entitled to the protection of the decree. Of those who were employed at that time, we know that some are still employed. Of the latter group, at least seven of the original 28 employees are still on the payroll. These seven released valuable claims for settling their disputes. It is harsh and unjust to deprive them of those fruits of the settlement. Whether there are others employed in 1945 who have a like claim to fair dealing is impossible to tell from the record.

We are all agreed that there is power in the District Court to modify the consent decree, whether or not the power to modify was reserved. *United States v. Swift & Co.*, 286 U. S. 106, 114. I agree with the Court that the union should not be disabled by that decree from carrying out the new union shop policy which Congress has made permissive. Cf. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 435-436. Certainly all employees who have joined the ranks since 1945 have no claim to its protection, as they are not included in its terms and gave nothing up in exchange for it. To construe it to include them would as a result of changing

circumstances turn the consent decree "into an instrument of wrong." *United States v. Swift & Co., supra*, 115. But when we set aside the decree as respects those who gave up something of value to get it, we do an injustice. I think the applicable principle is stated in *United States v. Swift & Co., supra*, 119. "The injunction, whether right or wrong, is not subject to its impeachment in its application to the conditions that existed at its making."